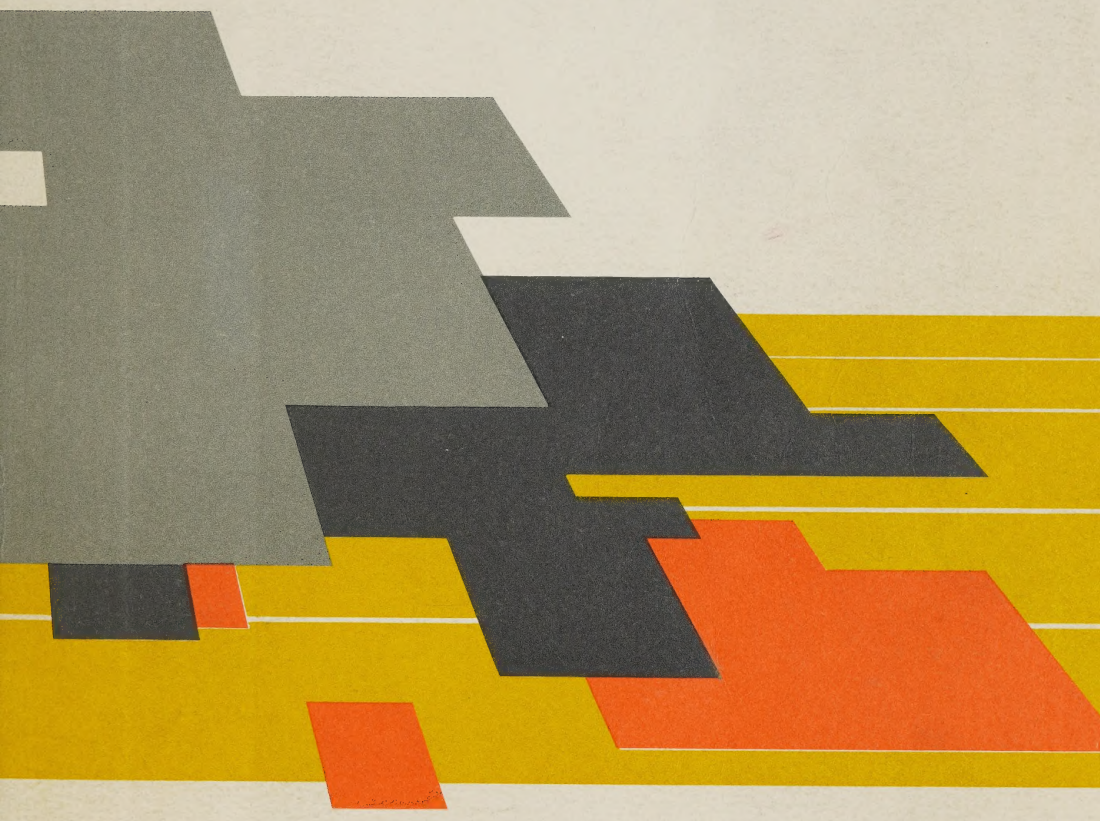
CANADIAN FEDERALISM AND ECONOMIC INTEGRATION

A. E. Safarian



CONSTITUTIONAL STUDY
PREPARED FOR THE
GOVERNMENT OF CANADA

Constitutional Study

CANADIAN FEDERALISM AND ECONOMIC INTEGRATION

by

A.E. Safarian

Prepared for the Government of Canada

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PREFACE

The distribution of economic powers between the federal and provincial governments has already been considered in several working papers on the Constitution notably those on the taxing powers, on federal-provincial grants, and on income, security and social services. The present paper considers those constitutional provisions which establish the common market in goods, services, labour and capital, as well as a number of associated economic institutions appropriate to an economic union.

A federal state, even in its economic aspects, is far more than a common market or economic union. In the Canadian federal state both the federal and the provincial governments have major economic roles to play, singly and jointly, as emphasized in the papers noted above. They also have a common interest in preserving and developing a large internal market and its associated institutions. In this study the implications of this common interest for the division of internal and external economic powers are considered in some detail for commodities, and, with less inclusiveness, for certain aspects of labour mobility and the harmonization of policies in other respects. The common market and economic union bases of a federal state clearly extend well beyond the selected topics covered here. Other directly associated issues, such as the requirements for a common capital market and transportation system, were to be covered in other papers.

This study was originally conceived as a background paper for use in the constitutional review. The views expressed here are those of the author, and are not intended to suggest any position on the part of the federal government. The study is thus fundamentally different from the series of working papers on the Consitituion which have been published by the federal government, and which contain tentative constitutional proposals of the government.

My debts to those who have assisted with this study are substantial. R.B. Bryce, then Economic Advisor to the Prime Minister on the Constitution, gave me the benefit of his wide knowledge and incisive comment through the first draft of the study. B.L. Strayer, Director of the Constitutional Review Section of the Privy Council Office, was extremely helpful at all stages of the study, both by his thoughtful comments on it and in securing the assistance of others. Alice Desjardins of the Privy Council Office also gave invaluable help, particularly with the constitutional background. I was very fortunate to have Derek Hum as my research assistant, for his abilities and his interest in the subject led not only to valuable assistance but to useful contributions to the development of parts of the paper. M.K. Evans was very helpful in editing the study.

I would like to acknowledge also the help of a number of persons in the Government of Canada who supplied information on specific topics and other assistance. In particular, I am grateful for help from persons associated with the Departments of Justice; Agriculture; Consumer and Corporate Affairs; Manpower and Immigration; and the Department of Industry, Trade and Commerce.

While gratefully acknowledging the help of all those noted, I should add that the entire responsibility for the analysis and conclusions of this paper has been, and remains, mine alone.

A.E. Safarian
November, 1973.

Contents

Part I

A Perspective

This paper is one of several in which the distribution of economic powers between the federal and provincial governments is examined. The constitutional provisions considered here are those which form the bases of the common market in goods, services, labour and capital and of a number of associated economic institutions. The purpose of this paper is to suggest how the federal and provincial governments should share the constitutional powers involved in order to ensure an efficient result both in the supply of public goods and services and in laws with respect to the private sector. The term *efficient,* as used here, means not only the most productive and most rewarding opportunities for our agents of production (labour, capital, and owners of natural resources), but also means the most desirable mix of goods and services from the viewpoint of consumption. The emphasis in this paper is on goods and labour, but the principles are of wider interest.

Both Confederation and the continuing policies which give it meaning involve much more than an exercise in economics. The quantity and quality of the economic base, however, provide the resources which are necessary for the fuller realization of *one* of the major objectives of Confederation. This objective has been proposed by the Government of Canada as follows:

> To promote national economic, social and cultural development, and the general welfare and equality of opportunity for all Canadians in whatever region they may live, including the opportunity for gainful work, for just conditions of employment, for an adequate standard of living, for security, for education, and for rest and leisure."[1]

The fuller realization of this objective can also help to realize the others which have been proposed — democracy, protection of basic human rights, and meeting our international obligations.[2] It is the hope and resolve of the Canadian people to enhance these objectives which is the ultimate justification of Confederation.

1. *Federalism and Economic Integration*

Federalism is a form of government which recognizes major regional

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1 Government of Canada, *The Constitution and the People of Canada,* (Ottawa, Queen's Printer, 1969), p. 10.

2 *Ibid.,* pp. 6-14.

differences while also recognizing, through a general government, the need for common institutions and policies.

Federalism is essentially a political concept. Consequently, no amount of discussion of the effects of economic integration can, by itself, fully explain this particular form of government. However, with federalism there occurs a particular degree of economic integration. The economic aspects of a federal state can be depicted by reference to the following forms of economic integration.

(*a*) *Free trade area* which involves the removal of customs tariffs and of quantitative restrictions, such as quotas, on trade between the member countries, but with each of them retaining its own distinct barriers against non-members.

(*b*) *Customs union* which, in addition to (*a*), standardizes such barriers by member countries against non-members.

— (*c*) *Common market* which, in addition to (*b*), removes restrictions on the movement of labour and capital between member countries.

—(*d*) *Economic union* which, in addition to (*c*), involves varying degrees of harmonization of national economic policies in order to remove discrimination that was due to disparities in these policies.

(*e*) *A federal state* which is a form of union in which the general government and the provinces or states each exercise exclusive jurisdiction in some major areas of policy and shared jurisdiction in others.

(*f*) *A unitary state* wherein the general government has jurisdiction over economic and other major policies.

The above classification is in increasing order of economic integration. There is, however, considerable scope for variation in some of these groups. Important parts of this paper will refer to stages (*c*) and (*d*) above, partly to clarify them, and also because other studies deal with several other economic aspects of the Canadian federal state. *It bears emphasis, however, that the Canadian federal state, in its economic aspects, is far more than simply a common market or an economic union as defined above.* The Canadian federal state is one in which both federal and provincial governments have major economic roles to play in preserving a large internal market for goods, services, labour and capital and in undertaking jointly many programs of common interest.

Within individual non-federal countries it is now normally taken for granted that there will be a common market in the sense used above, i.e., a single market within which goods, services, labour and capital may move freely without impediments created by public authorities. Production may be encouraged within particular areas or regions as a matter of regional economic policy, but normally this is done by means of subsidies or other

financial assistance, or perhaps by direct control over the location of industry, and not by placing barriers in the way of the movement of goods, services or the agents of production.

Within a federal country, such as Canada, the same general economic reasons exist for having a common market. Indeed, the large size of countries with whom we must compete and the formation of very large customs unions and free trade areas elsewhere in the world make it essential for Canada to derive maximum advantage from its own relatively small internal common market. But, in a federal country there is the danger of actions being taken by public authorities that will create impediments to the movement of goods, services, labour and capital. The existence of two major levels of government with powers of their own creates the possibility of divergent interests and policies, even though the general economic value of the common market is recognized.

It is usual for the constitutions of federal countries to contain provisions intended to protect the general interest in a country-wide common market. Often these take the form of allocating to the central government and legislative body control over international and interprovincial, or interstate, commerce in a broad sense. Sometimes there are specific provisions in the constitution prohibiting barriers to trade or migration between the states or provinces.

In addition to those provisions designed to preserve a common market, however, there is a need to ensure that regulatory, tax and other powers are exercised by governments in a manner consistent with this objective. The prohibition of explicit tax or other barriers to trade, for example, can be fully circumvented by a variety of regulations affecting the operation of an industry. The need to harmonize the sometimes disparate needs of mobility and regulation is partly satisfied by consultation on policy, but has constitutional ramifications as well.

A brief overview of the effects of economic integration will help to put into perspective the subsequent discussion of the division of powers in this paper.

2. *The Gains from Economic Integration*

It has long been known that one of the most important determinants of the wealth of nations is the division of labour, and that the most important determinant of the division of labour is the size of the market.[1] The division

[1] The size of market does not refer simply to geographic size or size of population. It is natural to think of these in a sparsely populated country in which westward expansion dominated for so long, and in which geographic size, climate, and terrain combine to make the reduction of costs of transfer and communication a major key to development. But, market size depends crucially on income. There are many countries which do not provide nearly as large a market, because their income per person is low. Market size depends also on the degree of concentration of population, which affects transport costs.

of labour, or specialization, is a key to the highly productive industry which we take for granted today. It is also part of one of the oldest principles of economics, applicable to persons, regions, and countries. No region, for example, is equally efficient in the production of all goods and services. For that region, and its people, the simultaneous attainment of efficient work and of an adequate standard of living is dependent on a high degree of specialization in the production of those goods and services in which it is comparatively most efficient (or least inefficient), and in exchanging these for goods and services in which it has a comparative disadvantage.

The corollary to specialization is exchange, or the interdependence of persons, regions, or countries. The process is limited by many things, such as by costs of transportation and by the desire to diversify in order to spread risks or to widen experience. However, these affect mainly the degree of specialization. It is also important to emphasize that comparative advantage is not fixed, but changes over time as changes occur in such determinants as the skills of a people, the nature of technology, transport costs, resource discoveries, and the pattern of demand. The principle of division of labour is applied widely in all economically developed societies, including those which are centrally planned, because of the increase in wealth which it brings. It is also widely applicable between countries in spite of barriers to the exchange of goods and services.

The size of the market permits more than a high degree of specialization of production and of sources of supply. It also gives the agents of production a wider setting in which to seek employment, to increase their individual rewards, and to find more desirable occupations. In the process, not only is the welfare of the individual worker or investor enhanced, but the income of the community is also raised. This process is not automatic. Accurate information on opportunities, retraining, and a comparable re-allocation of social capital are usually necessary to it. Nevertheless, the movement of labour and capital within and between regions, occupations and industries has been a significant aspect of rising opportunities and incomes both overall and for individual Canadians. The regional mobility of Canadians, moreover, serves more than the interests of efficient production and increased personal income. It also serves to satisfy the differing preferences of Canadians by enabling them to choose among the variety of public environments available in a federal system.

One of the important advantages which can come from a larger market is the pressure from competition for improvements in methods of production, in products, and in costs, and for the reduction of local monopoly. This is as true within the Canadian common market as it is with respect to import competition. It is also very likely that the quality of

entrepreneurship is partly related to the size of the market. The challenges which come from an expanding and competitive market setting are likely to bring forth a corresponding effort on the part of businessmen and to attract those who will respond to such challenges.

Partly as the result of specialization and the division of labour, it is possible to achieve efficient work and high living standards together. In particular, consumers can be assured of adequate variety and quality at reasonable prices so long as competition or regulation assures that the gains from specialization are passed on to them. But, economic integration does more than provide greater opportunities for the rewarding use of resources and for consumption. As a political institution, federalism encourages diversity while also permitting governments to mobilize resources for common tasks more effectively than any one of them could. In particular, it permits Canadians to bring resources to bear on the needs of the less developed regions and less fortunate individuals. It is the strength of the integrated Canadian economy which ultimately provides the means for such redistribution.

The emphasis on these benefits does not imply that government intervention in the operation of the common market is unwarranted from the point of view of economic efficiency, or otherwise. Intervention may be necessary from the economic viewpoint simply in order to make the common market operate more efficiently, such as with regulations to encourage competition and to ensure consumer protection. We also noted above the concern with regional development, and not just an increase in average living standards for Canada as a whole. These government actions are deliberate attempts to make the common market work better or to encourage its operation for agreed purposes.

Modern governments perform many regulatory functions and also directly supply a variety of public goods through taxation and borrowing. The constitutional issues involved have been examined in a series of papers on taxation, income security and social services, environmental management and other topics. [1] The relevant question in the present paper is the extent to which co-operation and co-ordination are essential in these and other policy areas if the benefits from economic integration are to be realized. Both provincial and federal governments can erode the economic union, and diminish the gains from it, by the exercise of some of their regulatory and spending powers. We must consider how far harmonization in these other functions requires constitutional expression rather than simply continuing co-operation at the policy level.

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[1] Government of Canada, *The Taxing Powers and the Constitution of Canada,* (Ottawa, Queen's Printer, 1969).

Government of Canada, *Income Security and Social Services,* (Ottawa, Queen's Printer, 1969).

J.W. McNeill, *Environmental Management,* (Ottawa, Information Canada, 1971).

3. Scope of this Study

A considerable number of the economic powers mentioned in the *British North America Acts* have some relationship to the structure of the common market and economic union. Since they will be referred to frequently, most of the economic powers as stated in these Acts are reproduced in Appendix 2. By itself, such an enumeration can be very misleading. A great deal of interpretation by the courts has to be considered for a full understanding of the division of powers. The pressures of economic change and government regulation, moreover, have a way of adding their own interpretations to the constitution.

The enumeration does help to state the focus of this paper more precisely. There are clearly a set of powers which relate very directly to many aspects of a common internal market and to common external policies. These are listed mainly as federal powers in section 91, since most are interprovincial and international in nature. The overall structure of the common internal market is evident in the opening paragraph of section 91, in 91 [2] (the trade and commerce power), in the provisions establishing a single currency and banking system and several other monetary institutions, and in section 121 which states that "all articles of the growth, produce, or manufacture of any of the provinces shall. . . .be admitted free into each of the other provinces". A set of common transportation facilities for interprovincial and international trade is provided for both in section 91 and in the exceptions to 92 [10]. A set of common institutions which can have a marked effect on the efficiency and perhaps even the viability of the common market in goods, services, labour and capital is provided for in the common postal service, weights and measures, census and statistics, bankruptcy and insolvency, patents and copyrights, unemployment insurance, some aspects of the spending power, and those aspects of competition policy which rest on criminal law. Finally, a number of external aspects of the common market are provided for by section 132 (the treaty-making power), sections 95 and 91 [25] (immigration, naturalization and aliens) and sections 122, 91 [2] and 91 [3] (tariffs on import).

These powers are directly relevant to the topic of this paper. Others may become so for certain purposes. For example, by sections 109 and 92 [5] the provinces generally maintain ownership rights to resources located within them. However, the interprovincial and international transfer of these resources is a matter which may be relevant for some purposes to the trade and commerce power. It should be added that some of the powers noted will be considered only in passing, either because their constitutional position is not in dispute, or in order to limit the scope of the present paper.

4. *Criteria for the Division of Powers*

It is useful to review briefly some criteria for the division of

powers.[1] At times, such criteria can help in deciding which level of government can best perform any given public function in the interests of individual Canadians. The comments at this point are necessarily general: more specific suggestions will be made as individual topics are considered. The present comments refer to socio-political questions, the supply of public services, and the regulation of production of private goods and services.

(a) There are important socio-political arguments which have been applied to this question. First, excessive centralization of political power in a democracy can mean that individual and minority perferences are unnecessarily overridden by the majority. In highly-centralized systems spread over a large area, the problem of access to government can also serve to make a government less susceptible to the wishes of its constituents between elections. Second, excessive centralization of functions reduces the scope for experimentation and innovation in the supply of public services. In this case, excessive centralization runs the dual risks of insufficient knowledge of, or attention to, local needs and insufficient stimulus to change. Third, and most important, Canada has a particular cultural setting, particular regional characteristics, and a particular history — including a constitutional history — which have long found expression in a federal form of government.

These socio-political considerations are generally assumed to point, in the main, to a significant degree of decentralization of functions in a federal state if the needs and preferences of the people are to be met. Other considerations, notably the identification with Canada as a country, point in the other direction. Such identification is apparent, for example, in the common institutions which have been developed, in the commitment to reduce regional and personal differences in income, and in the desire to sustain sufficient national capacity to permit national initiatives at home and abroad.

(b) A similar conflict appears when considering economic criteria in the supply of public services. *When considered by themselves,* two criteria suggest considerable centralization. These criteria are economies of scale and the existence of "externalities", or policy effects which extend beyond the jurisdiction of the government concerned.

(1) As to the first, economies of scale suggest the need to produce public services in units which are large enough, in terms of the population served, to give the lowest unit cost of production. This varies by type of

[1] See especially Government of Canada, *Federalism for the Future,* pp. 32-44, and *Federal-Provincial Grants and the Spending Power of Parliament,* pp. 20-30 (Ottawa, Queen's Printer, 1968 and 1969 respectively). For a summary of the growing literature on this and a useful bibliography see Douglas G. Hartle and Richard M. Bird, Criteria for the Design of Governmental Decision-Making Units, paper delivered to the annual meeting of the Canadian Economics Association, June, 1969 (mimeo, Institute for the Quantitative Analysis of Social and Economic Policy, University of Toronto); and Richard M. Bird, *The Growth of Government Spending in Canada,* (Toronto, Canadian Tax Foundation, 1970), ch. 9.

public service and, in practice, is often very difficult to determine. Nevertheless, it cannot be ignored without running the risk of unnecessary duplication of labour and overhead in providing public services.

(2) With respect to the second, there are "spillovers" in the public services provided by any level of government. Some of the benefits of its policies spill out to persons in other jurisdictions, while some of the taxes it levies spill in because they fall on persons living in other jurisdictions. The particular government involved, which is responsible to its own constituents, would tend to discourage policies which involve significant spill-outs while encouraging spill-ins. In this process the public's access to public services may be less than optimal, whether in total or for particular public services. This criteria points to larger governmental units which minimize the degree of spillover.

Such arguments obviously cannot be pushed too far. In modern economies most economic functions affect others in one way or another. If taken literally, the spillover argument would lead to a unitary state. It is the degree of spillover, or of scale economies, which is the relevant issue, and this is often not easy to determine on *a priori* grounds, much less in practice.

(3) More important, a third criterion tends to conflict with these. The minimization of production costs and capturing of spillovers within larger political units does not necessarily lead to the maximization of the welfare of the persons to whom the services are provided. The welfare of Canadians has a number of dimensions. It was emphasized in an earlier paper that one critical dimension is some minimum level of social services and income security for all Canadians.[1] The welfare of individual Canadians also depends, in part, on providing the kinds of public services which they desire. Individual preferences vary a good deal and it would be quite prohibitive to satisfy them in detail. So long as there is a diversity of public services and of accompanying tax structures supplied by communities and regions, some people can express their preferences by movement between them. Such "voting-by-foot" is obviously limited by the degree of mobility. This, in turn, will be determined by such things as the availability of employment and/or income so that a choice is actually possible. Such demand considerations are important to welfare where tastes differ, where mobility exists, and where there really is variety in community services. Contrary to "economies of scale" and "spillovers", the satisfaction of varying preferences points to as much decentralization as possible.[2]

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1 Government of Canada, *Income Security and Social Services.*

2 Indeed, the argument has been put more forcefully than this. It has been suggested that the justification for a federal form of government is that it makes it easier for citizens to express their preferences for public output of goods, services and laws. It does so by increasing the number of jurisdictions between which citizens can choose, thus increasing competition and reducing the degree of full-line supply. (Full-

(*c*) The regulation of the production and marketing of private goods and services can be thought of in the same way as we have treated public goods and services above, i.e., as a supply of public laws. It might be thought that similar criteria could be used in describing which level of government was to exercise regulatory powers in any given case. Economies of scale in production and distribution, and extra-regional spillovers, would point to regulation by larger governmental units while the need for variety to satisfy preferences would point to regulation by smaller units. The limitations of such an analogy become apparent when put in this way. Public services are supplied by governments to the constituents of the governmental unit. Private goods and services, by contrast, are supplied to as large a market as is economically feasible. The very point of a common market is to permit goods, services, labour and capital to move to and be secured from the widest possible sources. The producer interest in large market size and the consumer interest in access to variety generally coincide, rather than diverge, because of the transportability of many private goods and services.

Much of the analysis above might seem to point to a highly centralized government, but there are some important qualifications. First, there are some largely regional markets and industries, particularly in a number of service industries, which do not involve much extra-regional spillover. Second, provincial governments have a number of economic powers with regard to the supply of public goods and services which necessarily affect the operation of the common market, whether through taxation or expenditure. Finally, and most important, a federal state is much more than a common market and economic union. It is an exercise in government within a single country wherein two equal levels of authority have jurisdictions which are partly different. It should be apparent then that the common market-economic union aspects of a federal state cannot be absolute and without limit, and that *both* federal and provincial governments have important roles to play in preserving the benefits of this market as they exercise their respective powers.

It might appear at first sight that such conflicts within and between political and economic criteria would make it impossible to suggest what an optimal division of powers might be. A recognition of two points helps to ease this task, however. One is the need for a balance between conflicting criteria. In any given case, for example, one might balance any losses in political participation and in the satisfaction of diverse preferences against any gains resulting from the exploitation of scale economies and from

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line supply occurs when a person is forced to accept goods and services he does not desire in order to get those he does desire.) The critical criterion then becomes the satisfaction of the preferences of citizens, with a high degree of political participation by them in order to make these preferences clear. This points to a considerable decentralization of powers with the other two criteria, scale and externalities, serving as constraints where they are substantial. For a fuller statement see A. Breton, "Theoretical Problems of Federalism", *Recherches Economiques de Louvain* (September, 1970).

ensuring that important spillovers were contained within the jurisdiction of one government. More generally, one can note that the constituencies of the federal and provincial governments are different. Put broadly, the federal government, representing all Canadians, would have the sole or paramount power in matters which affect all Canadians. These involve matters of a *largely* national or international nature. The provincial governments necessarily serve mainly their provincial constituencies, hence must have sole of paramount power in areas which are *largely* local. The difference between these is often a matter of degree, a matter which experience and the need for some balance between objectives may help to resolve.

The other point is to recognize that some types of government policies will inevitably be highly interdependent. Present-day society does not permit the division of all powers into neat compartments, and the Constitution must serve Canadians over a period when considerable, and largely unforeseen, changes will occur. Whatever the exclusive powers assigned to each level, there is room for concurrency as well as exclusivity, for mixed jurisdictions, and for mechanisms for one level of government to exert influences on others. All of this may involve larger costs of transacting business between governments, but they are worthwhile if the public and private needs of Canadians are better served as a result.

When applied to the particular topics of the present paper, the above considerations would, in the main, seem to suggest federal powers. This would apply both to most legislation respecting the basic structure of the common market and economic union and also to the institutions which are highly important to its efficient functioning. This is because laws affecting the common market and economic union are likely to be national or international in nature.

This poses a major question. Some of the powers of the provinces are related to the structure or operation of the common market and economic union. The concurrent power over immigration in section 95 is a case in point. More important, many economic powers which are not related to the present topic at first sight can be exercised in ways which considerably affect the operation of the common market and economic union. What degree of co-operation and coordination in the use of these other powers is necessary in order to realize the gains from economic integration or simply to avoid emasculating those gains? The use of certain tax, expenditure and regulatory policies by either level of government can effectively nullify the elimination of internal barriers to trade, for example. To what extent must such questions be resolved by constitutional change rather than by co-operation in implementing policy? A later section will deal directly with this question.

It can be noted here that three types of economic functions will be distinguished in this paper in order to clarify the constitutional issues involved. These can be put in terms of the need for harmonization, i.e. for policy co-ordination by governments, in order to preserve the common market and economic union. First, full harmonization is *logically necessary* in certain functions or policy areas which relate to the formation and preservation of the structure of the common market and economic union. These areas are the defining characteristics of the federal common market. Secondly, certain other areas of policy should be harmonized if the gains from the common market are to be realized in practice, including some where the necessary co-ordination is unlikely to be achieved by consultation or by bargaining between governments. While not logically necessary to a common market or economic union, full harmonization in these areas may be described as *economically necessary*. It may also be consistent with the degree of economic integration appropriate to a federal state for general policy purposes. Thirdly, in some other policies a degree of harmonization is *economically desirable* in the sense that more uniform treatment would increase the gains from economic integration. However, in these cases such harmonization is not essential to the existence of the common market-union, and the policies may be basically directed to other, and perhaps even conflicting, objectives. The first two situations noted here involve questions for consitutional review while the third points to continuing or improved co-operation.

Part II

Commodities and the Economic Union

Economic integration means the abolition of specific forms of discrimination within an area. It differs qualitatively from economic co-operation, which seeks simply to lessen discrimination. It bears repeating that a federal state is based on much more than any economic gains — important as these may be. It is based on the acceptance of common objectives which include, but transcend, economics. Indeed, as noted earlier, a critical political *and* economic criterion of a federal state, that of ensuring effective political participation in the satisfaction of varied preferences, points to decentralization. However, a federal state also includes a degree of economic integration which needs constitutional expression. The economic integration involves a set of economic benefits which are important to the welfare of its citizens.

1. *Economic Benefits of Exchange: Internal Free Trade*

Internal free trade implies the absence of direct restrictions on commodity movements. The resulting gains from exchange can be stated briefly. Each province will have differing endowments of raw materials, of the stock of physical capital, and of labour. Each of these is understood to include important qualitative aspects also, such as the skills and ingenuity of its population and accessibility of raw materials. This means each province will have costs of production which, compared with other provinces, are more favourable for the production of some goods than others. The result is that each province will produce for trade a somewhat different range of products at any given time. Its comparative advantage in certain goods will be dynamic, however, changing with improvements in the quality of labour, reduction in transport costs, resource discoveries, organizational improvements, and so on. Since each province possesses somewhat different advantages, benefits will accrue to each from trade among themselves. The ability to obtain goods at lower prices through trade is equivalent to an increase in income to the province's consumers. In addition, more variety is available to satisfy consumer preferences.

In addition to this consumption effect, there are important gains from the production effects resulting from internal free trade. These can be considered in four categories: economies of scale, a more competitive market structure, a faster rate of technical change, and increased investment opportunities. The general effect of these is to permit a higher average wage rate and a higher average return on capital for the industries involved, without subsidy from the rest of the economy.[1]

First, larger markets permit the firm to take advantage of more efficient methods of production. In addition, the firm may benefit from economies external to it but dependent on an enlarged market. For example the development of a lower-cost source of supply or of a more profitable market by one firm may benefit others. Second, interprovincial trade can improve the market structure by increasing competition. A wider market can sustain a greater number of efficient units of optimum size, and it tends to reduce the number of less efficient producers. Also, productive units in other provinces are potential competitors. Whether these gains actually result, however, depends on whether monopolies and collusion among firms can be prevented. Third, there is considerable evidence that research is related positively to size of firm (other things being equal), which in turn depends partly on market size. Finally, the incentive to invest may increase with market size since this makes investment more profitable and also removes the uncertainties and risks from trade barriers. It should be noted that these production gains from trade may, themselves, lead to further trade. For example, the achievement of economies of scale or of more research and technical change can help to extend the size of markets both within and outside Canada for any given firm.

It is evident that there must be trade in order to secure the advantages of specialization, not only within and between provinces but also between nations. There must also be a market of adequate size to permit sufficient specialization and sufficient trade so that production can be carried on efficiently and so that distribution and trade can also be organized efficiently. Impediments to trade limit the size of the market and the opportunities to secure the higher productivity that comes from specialization, large-scale production and distribution. Thus, they reduce the real income that producers and consumers can obtain.

Some impediments to trade are inevitable, such as the real costs of transportation, and in many cases they determine the size of local or regional markets. Other impediments arise from the actions of either businesses or other private interests on the one hand, or from the actions of public authorities on the other. Private actions in restraint of trade are usually in-

[1] Some qualifications are necessary. In particular, in any given region the relatively abundant agents of production may find their incomes higher because of the larger market for their products, while relatively scarce agents experience the reverse because of increased competition for their products.

tended to reduce competition in one way or another, and are frequently prohibited by law. Public actions are intended to serve a variety of purposes. Sometimes the effects on interprovincial or international trade are an incidental by-product of other policies. In some cases federal and provincial governments attempt to mitigate the effects of competitive forces in the common market; for example, by easing the adjustments imposed on a particular group of producers by industrial change, or by favouring development in low-income regions. In still others, some form of barrier to trade is imposed in order to create local employment. Within a country such explicit barriers to interprovincial trade are not permitted, although some effective substitutes will be noted later. However, impediments to trade created by public authorities are common between nations, in the form of customs barriers or quantitative restrictions such as quotas.

2. *Confederation and the Common Market*

Before Confederation in 1867, the colonies from which the Dominion of Canada was formed did not constitute even a customs union. While there were no barriers to trade in natural products, there were important customs barriers to trade between them in manufactured goods. There was serious concern about markets, partly because of the free trade policy of England, and partly because of fear that the United States was going to terminate the reciprocity treaty of 1854. The record of the speeches and debates of the Fathers of Confederation indicates their intention that Confederation should bring about a customs union, a common market, a high degree of monetary integration and a growing national economy to support the political union. Indeed there is evidence that this was a main purpose of Confederation.

The terms of the *British North America Act,* 1867, reflected this intention. The central Parliament was given exclusive powers not only over the regulation of trade and commerce, but also over currency and banking, weights and measures, shipping and interprovincial railways and telegraphs, and other interprovincial undertakings. Only Parliament could levy customs duties, and a general clause provided that goods grown or made in any province should be admitted free into other provinces.

These provisions in the *British North America Act* clearly indicate the intention to establish an economic union. Such a union has been realized in practice to a considerable extent. It has provided a foundation for the growth of an efficient Canadian economy and a substantial, continuing improvement in living standards and public services for most Canadians.

The strength of the integrated Canadian economy has also permitted the deliberate use of public policies and measures to improve economic and social conditions in parts of Canada where the free play of competitive forces would otherwise have produced an unacceptable situation. In recent years

this has taken the form of measures to reduce regional economic disparities and to equalize the revenues required for provincial public services, as well as measures to alleviate poverty and to promote equality of opportunity. There has been widespread agreement on the deliberate use of measures to counteract the effects of the workings of purely economic forces, as well as some effects of external trade policies, or other policies, adopted in the general interest.

In addition to these interventions of public authorities in the working of markets in order to reduce regional disparities, there has been a variety of actions taken to improve the position of those growing or making particular products. From Confederation to World War II, these actions normally took the form of external tariffs or other protectionist trade measures. More recently, they have generally taken the form of subsidies or of credit provided on favourable terms. However, they have also increasingly taken the form of intervention by various public authorities or agencies in the working of the market. In some cases, these have been in relation to mineral products; for example, the prorationing of oil, gas and potash production within a province; or the requirements for processing within Canada, or within a province, as a condition to securing, or exercising, mineral rights. Such actions have had some effects on both international and interprovincial trade. The main interventions in the working of the markets by public authorities, however, have been in the marketing of farm products. This led to a clearly undesirable situation in the markets for eggs and chickens, as will be noted in a later section.

All the Canadian provinces appear to accept, in principle, that internal free trade and common external trade arrangements are *logically necessary* to a federal state. These are embedded in practice in the successful operation of the Canadian economy. [1] The difficulties arise in the implications of this for other provisions of a federal constitution, wherein both levels of government have substantial jurisdiction in economic affairs. How can the necessary powers of provincial and federal governments to regulate be reconciled with the desire to preserve internal free trade and the common external commercial policy?

The issue of regulation arises for a variety of reasons. In some cases present and future governmental and public conclusions will be that pricing

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[1] The extent of interprovincial and international commodity trade can be judged by several studies. See, for example, Economic Council of Canada, *Interim Report on Competition Policy* (Ottawa, Queen's Printer, 1969) pp. 223-32. In 1967, 56% of all *manufactured* goods were shipped to points within the province of origin, 28% to other provinces, 16% to points outside Canada. Of the 132 manufacturing industries shown, 31% sold over half of their shipments to customers in other provinces or outside Canada. Only 10% of the industries sold less than one-tenth of their shipments outside the province. In 1960 nearly one-third of Nova Scotia's manufacturing industries obtained 38% or more of their material inputs from outside the province. Of all the commodities produced in Quebec, both primary and manufactured, 40-50% are exported abroad or to other provinces. Ontario accounts for more than 30% of such shipments, the U.S. for more than 25%.

systems and free individual or institutional choice are the most effective way to allocate resources. In other cases, however, the judgment will be that regulation of the private sector and/or public production of the goods is the proper method. This may be simply to reinforce greater market efficiency in allocating resources, as with competition policy. It may be in order to encourage an allocation of resources more conducive to development of some regions. It may be to slow the decline of a particular industry, or to ease the adjustments imposed on a particular area or work force by competitive forces, or to realize some other object of public policy. International market forces may be modified for cultural reasons as well.

What should be considered for purposes of constitutional review are the ways in which regulatory powers relate to the present topic. Three questions arise insofar as the common market and economic union are concerned. How far have the regulatory powers and the common market powers been consistent in general terms? What exceptions to the common market have created particular problems which may require the raising of constitutional issues? What regulatory powers are important to the effective working of the common market? All of these raise some important points regarding the optimal assignment of federal and provincial regulatory powers in economic affairs.

3. *Regulation and the Common Market: The Constitutional Background*[1]

A given economic transaction can raise the question of economic regulation under a number of headings. Those which are most relevant to the issue of regulation as it relates to free internal trade are the following:[2]

(1) Only the Parliament of Canada has the power to levy customs and excise duties (section 122 of the *B.N.A. Act*) and generally to raise money "by any Mode or System of Taxation" (section 91 [3]). It may also enact legislation for "The Regulation of Trade and Commerce" (section 91 [2]).

(2) The provinces have exclusive jurisdiction over property and civil rights (section 92 [13]). They may impose "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes" and have jurisdiction over "... Licences ... for Provincial ... Purposes" (section 92 [2] and [9]), and "... Matters of a merely local or private Nature..." (section 92 [16]). They also have jurisdiction over "the Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon" (section 92 [5]), and over "Local Works and Undertakings" (section 92 [10]).

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1 See Peter H. Russell *Leading Constitutional Decisions* (Toronto, McClelland and Stewart Ltd., 1973), Parts I and II; Alexander Smith *The Commerce Power in Canada and the United States* (Toronto, Butterworths, 1963); and K.C. Wheare *Federal Government* (Oxford Press, 1964, 4th edition).

2 The full wording of these sections is given in the Appendix to this paper.

(3) "Agriculture" is a concurrent jurisdiction, with federal paramountcy in the event of conflict (section 95), but marketing is not considered to be part of "agriculture" as that term is used in this section.

(4) Section 121 of the *British North America Act* provides that "All Articles of the Growth, Produce or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces."

(5) The Parliament of Canada has successfully used its declaratory power (section 92 [10] c) to secure jurisdiction over grain elevators and railroads, and other works.[1]

Until 1949, the final arbiter of the Canadian constitution was the Judicial Committee of the Privy Council. After that date, the Supreme Court of Canada ceased to be subordinate to the Privy Council for the matters considered in this paper.

The importance of judicial review for federal countries is underlined when it is realized that the courts ultimately resolve whether a particular piece of legislation inherently falls within federal or provincial jurisdiction. In Canada the constitutional propriety of a particular act depends upon both the subject matter of the legislation and the previous and possible meanings attached to the relevant legislative categories of the *British North America Act*. Moreover, an institution, activity, etc., may have aspects that are subject to control by both a federal and a provincial law, each of which is, by itself, within the jurisdiction of the enacting legislature. These two laws are then said to be overlapping. If there is no conflict they may co-exist and both regulate that institution, activity, etc. If there is a conflict, the federal law is paramount. The courts would probably find that a conflict exists if a citizen cannot abide by one law without violating the other, or if both are identical.

Establishing the Common Market

Section 121 may be taken as the primary constitutional expression of the internal common market. It has been interpreted as imposing restrictions on the fiscal, but not on the regulatory powers of government. In the case of *Gold Seal Ltd. v. A.G. of Alberta* [2] difficulties arose from the federal government's attempt to reinforce provincial prohibition laws by banning the importation of alcoholic beverages into any province where their sale for local use was already prohibited by provincial legislation. An objection was raised that the federal law was incompatible with section 121 since the immediate effect of federal legislation was to prevent interprovincial shipment of alcoholic beverages. In finding the federal legislation valid, Duff, J. limited the scope of section 121 by stating that "the real object of the clause is to

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1 A. Lajoie, Le Pouvoir declaratoire du Parlement (Montreal, Les Presses de L'Université de Montreal, 1969).

2 [1921] 62 S.C.R. 424, 62 D.L.R. 62.

prohibit the establishment of customs duties affecting interprovincial trade in the products of any province of the Union". The majority judges therefore interpreted section 121 so as to rule out the application of fiscal legislation pertaining to tariffs, but recognized the validity of federal and provincial laws of a regulatory nature such as local prohibition laws or the *Canada Temperance Act.*

Once certain goods were admitted into a province, section 121 did not prevent the province from legislating to regulate such goods. Thus a provincial law prohibiting the sale of alcoholic beverages within the province was declared compatible with section 121.[1] Similarly, a New Brunswick statute requiring residents to pay tax on imported tobacco equivalent to the local sales tax did not constitute a tariff hindering interprovincial trade but was confirmed as a tax equivalent to that which would have been paid had the purchase been made locally.[2] Therefore, section 121 has been generally interpreted as applying equally to Parliament and provincial legislatures and as establishing duty-free provincial borders.

The case of *Murphy* v. *C.P.R* [3]involved the *Canadian Wheat Board Act* which gave the government board a monopoly over the movement of wheat from one province to another and for export. The Court had to decide whether a railway company could legally refuse to transport a vendor's grain on the grounds that such a shipment had not been authorized by the board. The Supreme Court of Canada held the federal Act to be valid under the trade and commerce power. Section 121 was interpreted as establishing only a duty-free border between provinces. A significant departure in interpreting section 121 is to be found, however, in Mr. Justice Rand's opinion. Noting that federal authorities may exercise control over trade, except to the extent that section 121 is applicable, Rand, J. seemed to equate the words "All Articles of the Growth, Produce or Manufacture" of section 121 with interprovincial "Trade" and affirmed that section 121 was aimed

> "... against trade regulation which is designed to place fetters upon or raise impediments to or otherwise restrict or limit the free flow of commerce across the Dominion as if provincial boundaries did not exist".[4]

Also, for Rand, J., the term "free" meant not only the absence of customs duties but also "without impediment related to the traversing of a provincial boundary".[5] Moreover, although the Canadian Wheat Board regulated the movement of wheat through a quota system it nevertheless, according to him, ensured that the flow was maintained if demand was adequate.

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1 *R.* v. *Nat. Bell Liquors Ltd.* [1922] 2 A.C. 128, 65 D.L.R. 1.
2 *Atlantic Smoke Shops Ltd.* v. *Conlon & A.G. Canada* [1943] A.C. 550.
3 *Murphy* v. *C.P.R. & A.G. Can.* [1958] S.C.R. 626, 15 D.L.R. (2d) 145.
4 *Ibid.* [1958] S.C.R. 626,642.
5 *Ibid.*, 638.

As he saw it, section 121 did not guarantee each producer the right to ship his total production without regard to his position in the line.

The precise wording of section 121 reflects the historical situation that the provinces, which formerly had customs duties, were to abolish such duties on trade with one another, while the power to enact a uniform tariff against other countries became federal by virtue of section 92 [2], 91 [3], and 122. The wording may overlook the possibility of taxes on commodities imported from abroad, hence not "of the Growth, Produce or Manufacture of any one of the Provinces", as they cross provincial borders. They could be subjected to a provincial tax based on section 92 [2] and [9], or to a federal duty. This possibility may be remote, but should be considered in any rewording of this section.

More fundamental, the constitutional guarantee of a common market is incomplete. The wording of section 121 prohibits interprovincial customs and other explicit border taxes. It makes no explicit reference to services, to capital, or to persons, even though free mobility in these respects largely obtains in Canada today. In effect, this guarantee is directed to the formation of a customs union, not a common market.

It will be noted that the emphasis appears to be on customs duties ("free"), rather than on the more general idea of unrestricted movement (i.e., "freely"). There are many ways, other than by duties, in which the movement of commodities can be restricted, ranging from direct and visible ones, such as quotas, to a wide range of invisible or indirect devices. Completely unrestricted trade would demand standardization of many policies which affect mobility in indirect ways, a position which is clearly untenable both in terms of a federal state and in relation to other economic objectives. We shall return to this once certain regulatory powers have been considered.

In summary, section 121 of the *B.N.A. Act* constitutionally establishes a customs union rather than the more integrated, and largely *de facto,* common market for Canada. Section 121, as interpreted traditionally, would seem to have precedence over the trade and commerce power of section 91 [2]. Nevertheless, it is still not quite clear whether the commerce power should prevail over section 121 and whether the power to amend the *B.N.A. Act,* committed to Parliament in 1949, extends to section 121. [1] Section 121 may be viewed, moreover, as only one of several elements in the establishment of the Canadian common market.[2]

[1] Favouring this opinion, see Alexander Smith, *op. cit.*, at p. 65, note 2.

[2] See for instance Laskin, J. in *A.G. Manitoba* v *Manitoba Egg & Poultry Association* [1971] S.C.R. 689, 717.

> ... the Manitoba scheme cannot be considered in isolation from similar schemes in other provinces; and to permit each province to seek its own advantage, so to speak, through a figurative sealing of its borders to entry of goods from others would be to deny one of the objects of Confederation, evidenced by the catalogue of federal powers and by section 121, namely, to form an economic unit of the whole of Canada: see the *Lawson* case [1931] S.C.R. 357,373.

The Distribution of Powers: Federal Powers[1]

Two of the principal heads of jurisdiction in the *B.N.A. Act* under which Parliament regulates the economy are the "Peace, Order and Good Government" and "The Regulation of Trade and Commerce" clauses.

(a) The introductory clause of section 91 has been applied mainly in three ways: as a basis for the emergency doctrine, as a basis for the "national dimension" doctrine, and as the source of the residuary power which was left in the hands of the federal Parliament.

The origins of the emergency doctrine can be found, to some extent, in the *Russell* case[2] and, more fully, in the *Board of Commerce* case[3]. It took a recognizable form in the *Fort Frances* case[4] and in the *Snider* case of 1925[5]. It was reiterated in the *Japanese Deportation* case[6].

In the *Fort Frances Pulp and Power* case the Privy Council declared:

> "In the event of war, when the national life may require for its preservation the employment of very exceptional means, the provision of peace, order and good government for the country as a whole may involve effort on behalf of the whole nation, in which the interests of individuals may have to be subordinated to that of the community in a fashion which requires section 91 to be interpreted as providing for such an emergency."[7]

In the *Japanese-Canadian Deportation* case, the emergency doctrine was reiterated but a new note was added in the following statement:

> "Again, if it be clear that an emergency has not arisen, or no longer exists, there can be no justification for the exercise or continued exercise of the exceptional powers. . . .But very clear evidence that an emergency has not arisen, or that the emergency no longer exists, is required to justify the judiciary, even though the question is one of *ultra vires,* in overruling the decision of the Parliament of the Dominion that exceptional measures were required or were still required."[8]

The emergency power may be used not only in case of war,[9] but also in case of famine, pestilence, and perhaps other crises. In *Swait* v. *Board of*

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1 The aspects of spending and taxing powers which are of interest to this topic are covered in Government of Canada. *Federal-Provincial Grants and the Spending Power of Parliament.* (Ottawa, Queen's Printer, 1969) and in Government of Canada, *The Taxing Powers and the Constitution of Canada.* (Ottawa, Queen's Printer, 1969).

2 *Russell* v. *The Queen*[1881-82] 7 A.C. 829

3 *Re Board of Commerce Act and Combines and Fair Prices Act* [1922] A.C. 191.

4 *Fort Frances Pulp and Power Company* v. *Manitoba Free Press* [1923] A.C. 695.

5 *Toronto Electric Commissioners* v. *Snider* [1925] A.C. 396.

6 *Cooperative Committee on Japanese Canadians* v. *Attorney General for Canada* [1947] A.C. 87.

7 [1923] A.C. 695, 703-04.

8 [1947] A.C. 87, 101-102.
In re *Wartime Leasehold Regulations* P.C. 9092 [1950] S.C.R. 124.

Trustees of Maritime Transportation Unions[1] one judge, Brossard, J., has recognized the influence of the emergency aspect of labour unrest in Canada as a possible basis for federal jurisdiction. It is not yet judicially determined whether an economic crisis would justify "emergency" federal jurisdiction but it should be noted that there is no judicial pronouncement against this proposition.

The "national dimension" doctrine originates from a statement of Lord Watson in the *Local Prohibition* case:

> "Their Lordships do not doubt that some matters, in their origin local and provincial, might attain such dimensions as to affect the body politic of the Dominion, and to justify the Canadian Parliament in passing laws for their regulation or abolition in the interest of the Dominion. But great caution must be observed in distinguishing between that which is local and provincial, and therefore within the jurisdiction of the provincial legislatures, and that which has ceased to be merely local or provincial, and has become a matter of national concern, in such sense as to bring it within the jurisdiction of the Parliament of Canada."[2]

The doctrine was invoked there and in later cases in order to support federal jurisdiction in the control of liquor across Canada. In *Johannesson* v. *West St. Paul*[3] it was held by the same reasoning that the whole area of aeronautics fell under federal jurisdiction. Similarly, control over uranium comes under federal jurisdiction according to the case of *Pronto Uranium Mines Limited and Algom Uranium Mines Limited v. Ontario Labour Relations Board.*[4] *McLennan, J., of the Supreme Court of Ontario stated:*

> "In this day it cannot be said that the control of atomic energy is merely of local or provincial concern, and in my opinion it is a matter which from its inherent nature is of concern to the nation as a whole..."[5]

Again, in *Munro* v. *National Capital Commission,* [6] it was recognized on the same basis that the federal Parliament did possess a power of expropriation which could be delegated to the National Capital Commission for the purpose of establishing a green belt in the national capital region.

The general clause as a residuary power is the basis for the federal jurisdiction to incorporate companies with other than provincial objects.[7] In the *Radio* case,[8] Lord Dunedin referred to legislation in relation to radio communication as falling within the general words at the opening of section 91,

1 (1966) 61 D.L.R. (2d) 317 (Que. C.A.).
2 *A.G. Ontario* v. *A.G. Canada* [1896] A.C. 348, 361
3 [1952] 1 S.C.R. 292, [1951] 4 D.L.R. 609.
4 [1956] 5 D.L.R. (2d) 342.
5 *Ibid.*,348.
6 [1966] S.C.R. 663.
7 *Great West Saddlery Co.* v. *The King* [1921] 2 A.C. 91
8 *Re Regulation & Control of Radio Communication in Canada* [1932] A.C. 304

the subject not being mentioned explicitly in either section 91 or section 92. Citizenship, the protection of free discussion of public affairs, freedom of religion, and the spending power would also, according to certain judges, rest in part on the residuary power. More recently, federal legislative jurisdiction over the territorial sea and the continental shelf off the shores of British Columbia was held to rest on the general clause.

It is difficult to say whether the national dimension doctrine or the residuary power might be used as bases for federal jurisdiction in order to regulate and maintain the Canadian common market. To do so, the courts would have to come to the conclusion that the regulation of the common market is a matter of an inherently national character, or that such regulation does not otherwise fall within section 91 or section 92. The second proposition is doubtful since, as noted earlier, many heads of both sections contain specific legislative powers related to the economy. For the same reason the first proposition could be used only rarely, probably as a subsidiary argument to support an otherwise federal jurisdiction.

Among the most important of the enumerated powers is the Trade and Commerce power.

(b) The word "Trade" and the word "Commerce" in section 91 [2] have not been given the wide interpretation that similar words have received in the constitutional law of the United States and of Australia. In the *Manitoba Reference* case, Laskin, J., stated that the

> ". . . meaning of trade and commerce in respect of transactions in goods, as opposed to non-commodity transactions, does not appear to have been elucidated in any reported case, but has been left to inference from the nature of the legislation under review". [1]

It is still an open question whether the power does apply to non-commodities.

Moreover, the federal power to regulate trade and commerce has been given a narrow interpretation in another sense. This was demonstrated in the *Parsons* case [2] which was concerned with the validity of an Ontario statute prescribing uniform conditions for fire insurance contracts unless variations were properly indicated. In finding the Ontario legislation within provincial jurisdiction, the Privy Council characterized the legislation as relating to property and civil rights, and stated that Parliament could not by its trade and commerce power regulate the contracts of a particular business or trade in a province. This specific restriction was prefaced by the more general remark that the trade and commerce power embraced only international, interprovincial and, maybe, trade affecting the whole of Canada. As one authority has remarked:

1 *A.G. Manitoba* v. *Manitoba Egg and Poultry Association* [1971] S.C.R. 689, 708-09.

2 *Citizens Insurance Co.* v. *Parsons; Queen Insurance Co.* v. *Parsons [1881-82] 7 A.C. 96.*

> "A clause expressed in terms unrestricted, and purporting, therefore, to embrace all trade and commerce whatsoever, has suffered, by means of judicial surgery, the amputation of one whole limb of the power, namely, that representing intraprovincial trade and commerce, leaving for Parliament only jurisdiction over international and interprovincial commerce, as well as general commerce affecting the whole of Canada".[1]

Later decisions have attempted to define the scope of the trade power by considering the distinctions between interprovincial, intraprovincial and general trade. It was established in the 1916 *Insurance Reference*[2] that Parliament could not establish general schemes to regulate the insurance business throughout Canada by use of the trade and commerce power. In 1937 it was held that the Parliament of Canada had no authority under section 91 [2], to regulate marketing schemes within individual provinces.[3] A few years later the power with respect to "general trade" was applied to allow the federal Parliament to regulate and protect the use of a national trade mark across Canada.[4] was it again applied recently by the Federal Court of Appeal[5] to validate federal control of certain business conduct as provided in section 7 of the *Trade Marks Act*.[6]

It was also recognized that the Parliament of Canada has legislative authority to enact schemes regulating interprovincial and international trade even though they may have an effect on trade in a purely intraprovincial sense. In the case of *Murphy* v. *C.P.R.*[1], the litigation related to the validity of the *Canadian Wheat Board Act* which created a federal board with jurisdiction to purchase, store and market all the wheat and grain produced on the Prairies. The Board had exclusive jurisdiction to sell wheat and grain for export. Section 32 provided that, except through special regulations, no person other than the Canadian Wheat Board had authority to transport, buy or sell grain for movement from one province to another and from Canada to other countries. The court had to decide whether a railway company could legally refuse to transport a vendor's grain from one province to another on the grounds that he had not been authorized by the Board to ship it. The court established that this control was a valid exercise of federal authority in the matter of trade and, consequently, that the federal legislation could "infringe" on property and civil rights.[8]

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1 Alexander Smith, *op. cit.*, 175.
2 *A.G. Canada* v. *A.G. Alberta* [1916] 1 A.C. 588.
3 *A.G. for British Columbia* v. *A.G. for Canada* [1937] A.C. 377; *Shannon* v. *Lower Mainland Dairy Products Board* [1938] A.C. 708.
4 *A.G. Ontario* v. *A.G. Canada* [1937] A.C. 405, 416-18.
5 *Vapor Canada Ltd.* v. *MacDonald* [1973] 33 D.L.R. 434.
6 R.S.C. 1970 c. T-10.
7 [1958] S.C.R. 626.
8 Neither Locke J., who was joined by Taschereau, Fauteux and Abbott JJ., nor Rand J. made a pronouncement on the applicability of the Act in the case of a person wishing to have wheat transported from one province to another for his own use. Cartwright J. (page 644) suggested that this question came under the general clause of section 91 but depended upon its compatibility with section 121 which forbids the setting up of barriers between one province and another.

A year later, in *Regina* v. *Klassen,*[1] the Manitoba Court of Appeal declared section 16 of the *Canadian Wheat Board Act* valid and applicable to a local grain elevator. This section of the Act enabled the Board to fix quotas on the delivery of wheat to grain elevators and mills. The basic assumption behind the court's reasoning was that, in order to obtain maximum efficiency, the right to establish quotas must be applicable to all levels of delivery including mills which processed grain which was grown, purchased and consumed locally.

On the other hand, a provincial law may be considered local in character although it has some "indirect" effects on interprovincial trade. Some insight into the application of the concepts of "direct" and "indirect" effects on interprovincial trade was given in the case of the *Carnation Company* v. *The Quebec Agricultural Marketing Board.*[2] The *Quebec Agricultural Marketing Act* enabled a marketing board to establish the milk price paid to producers by the distributors. The Carnation Company asserted that the milk purchased by them was later processed and exported from the province. Referring to the opinions of Kerwin C.J., Rand, Locke and Nolan J.J. in the 1957 *Reference re the Ontario Farm Products Marketing Act,*[3] the Company argued that an activity could take place within the Province and yet not be subject to local control. The court concluded that the purpose of the legislation was to enable a group of milk producers to improve their position with regard to the distributor. The Act provided for a system whereby the price of milk was fixed through arbitration: it was similar in character to labour laws, and its validity had to be assumed unless otherwise proved. No doubt legislation of this kind affected the Company's interprovincial trading activities, but the question was whether or not the Act was applicable to interprovincial trade. The court, through Martland, J., reconciled the opinions of the four judges in the 1957 reference with that of Abbott, J., in the following manner:

> "While I agree with the views of the four judges in the *Ontario Reference* that a trade transaction, completed in a province, is not necessarily, by that fact alone, subject only to provincial control, I also hold the view that the fact that such a transaction incidentally has some effect upon a company engaged in interprovincial trade does not necessarily prevent its being subject to such control."[4]

Reverting to the principle that each regulation should be examined in the light of the facts which gave rise to the issue, the Court finally concluded that the Act and the regulations did not exert direct control over the movement of goods from one province to another.

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1 [1959] 29 W.W.R. 369.

2 [1968] S.C.R. 238

3 [1957] S.C.R. 198. This Reference is discussed below.

4 *Ibid.*, 253.

At no time, however, may a province regulate in such a way that it creates a barrier to the interprovincial movement of goods. It is not easy to detect what forms of legislation do create these barriers, but it would seem from *A.G. Manitoba v. Manitoba Egg and Poultry Association*[1] that, if a local board imposes quotas on goods entering the local market from an extraprovincial source, the regulations giving effect to that decision do interfere with interprovincial marketing and, therefore, with federal jurisdiction.

The facts giving rise to the Manitoba Egg and Poultry Association reference are related to the "chicken and egg war", the details of which are discussed later. Since there is no provision in the *B.N.A. Act* permitting one province to initiate a direct challenge to the legality of a law of another province[2], the Manitoba Government prepared regulations and an order setting up an egg marketing scheme allegedly similar to a Quebec egg marketing scheme which the Manitoba government wished to challenge. Manitoba then referred the proposed regulations and order to its Court of Appeal, whose opinion was subsequently appealed to the Supreme Court of Canada.

The nine judges of that Court were unanimous in finding that the provincial regulations, as drafted, were *ultra vires*. Laskin, J. expressed regret, however, in having so few facts on which to judge the operation of the contemplated law.[3]

The Manitoba plan purported to order all producers in the Province to send their entire production to a grading station and to market it only through a board acting as their selling agent. The board would have the authority to impose marketing quotas and to prohibit the offering for sale of a particular regulated product in order to ensure the orderly marketing of that product. No eggs could be sold or offered for sale unless graded, packed and marked by a grading or packing station under contract with the board.

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1 [1971] S.C.R. 689

2 Manitoba pleaded unsuccessfully on October 19, 1970, before the Supreme Court of Canada, that section 3 of the *Supreme Court Act* gave the court original jurisdiction in such disputes.

3 See in particular Laskin J. 704-05;

> "As it is, I know nothing of the nature of the market for eggs in Manitoba or outside of it, nothing of the production of eggs in that province, nothing of the uses to which the production is put, nothing of the number of producers in Manitoba, nothing of any problems that have been created in relation to quality, price or otherwise by the entry of out-of-province eggs. . . A knowledge of the market in Manitoba, the extent to which it is supplied by Manitoba producers, and of the competition among them as it is reflected in supply, quality and price, would be of assistance in determining the application of the proposed legislative scheme. Thus, if out-of-province eggs were, to put an example, insignificant in the Manitoba market, this would be a factor bearing on a construction of the scheme as operative only in respect of Manitoba producers, retailers and consumers in production, distribution and consumption in Manitoba. Conversely, if such eggs were significant in the Manitoba market, the legislative scheme, not being expressly confined to production, distribution and consumption in Manitoba, could properly be regarded as directed to the out-of-province eggs. In this respect, the issue would be one of its validity or invalidity, and not one of construing it to be applicable only to the distribution and consumption within the province of eggs produced in the province."

The board was also to set prices of sale from time to time. The board itself was to be elected by Manitoba producers. It was to market all eggs in Manitoba, whether produced in Manitoba or brought in from outside the province. The stated purpose of the plan was "to obtain for producers the most advantageous marketing conditions for the regulated product".

Having regard to this stated purpose of the regulations, Martland J. (the Chief Justice, Abbott, Judson, Ritchie, and Spence, JJ., concurring) readily came to the conclusion that the whole scheme was evidently designed to restrict or limit the free flow of trade between provinces. Pigeon, J., agreed, stressing that the scheme was not only designed to subject eggs from outside the province to the same trade regulations as those produced therein, but that it was also designed to restrict, by means of quotas, the local sale of eggs produced elsewhere to whatever extent would best serve the interests of the local producers, even if this meant a complete prohibition of such sale. After having stressed many reservations, Laskin, J. (Hall J., concurring) concluded that the scheme on its face was an invasion of federal power in relation to section 91 [2]. The scheme had as a direct object the regulation of the importation of eggs to the best advantage of the producers within the province. No province could seal its borders to the entry of goods from another province since that would deny one of the objects of Confederation, which was evidenced by the catalogue of federal powers and by section 121, namely, the formation of an economic unit of the whole of Canada.

Intraprovincial trade may be loosely defined as transactions which take place "wholly within the province". In fact, "to justify the upholding of provincial legislation . . . it was sufficient to show that the transactions affected had their beginnings and endings in the province".[1] However, the limits of interprovincial trade are difficult to define and the jurisprudence has been careful not to provide any clear definition. In *Reference re Ontario Farm Products Marketing Act*,[2] the question was whether or not the Province of Ontario could validly organize the marketing of farm products within its borders and whether it had the authority to prohibit the sale of certain goods. The Act empowered a provincial board to purchase or sell all farm products, including tobacco and honey, to make use of advertising media for this purpose, and also to undertake the grading, packing and transportation thereof. Since 1937[3] there had been good grounds to believe that, because local trade covered operations completed within the province, the production phase for commodities intended for interprovincial trade as well as all other phases prior to interprovincial movement came under provincial jurisdiction, provided, of course, that they were completed within the province.

1 Alexander Smith, *op. citl*, p. 76.

2 [1957] S.C.R. 198.

3 *Reference re Natural Products Marketing Act sub. nom. A.G.B.C.* v. *A.G. Can.* [1937] A.C. 377

However, four of the eight judges who heard the case, namely, Kerwin,[1] Rand,[2] Locke and Nolan, J.J.,[3] held that an activity could take place within a province but not be deemed internal trade. On the one hand the sale of a product completed within the province could come under provincial jurisdiction, even if the buyer later decided to ship it elsewhere. On the other hand, if the producer intended his product for export or sold it outside the province and had to retain the services of a slaughterhouse and packing company before exporting it, he would not in that respect be subject to provincial regulation. Therefore, according to this line of reasoning there are two complete networks of trading activity in Canada, one under federal jurisdiction and the other under provincial jurisdiction. Fauteux[4] and Abbott, JJ.,[5] also noted that it was not necessary for a product ultimately to be sold locally for an operation to be considered intraprovincial. Abbott, J. added:[6]

> It is hard to conceive of any important article of commerce, produced in any Province, which would not, to some extent at least, enter into interprovincial or export trade. Certainly milk, which was the product regulated in *Shannon's Case* in its processed form at any rate, must be exported from British Columbia. Similarly it is common knowledge that potatoes in substantial quantities are shipped out of Prince Edward Island.
>
> The power to regulate the sale within a Province of specific products, is not, in my opinion, affected by reason of the fact that some, or all of such products may subsequently, in the same or in an altered form, be exported from that Province, unless it be shown, of course, that such regulation is merely a colourable device for assuming control of extraprovincial trade. Similarly, the power to regulate the wages of those engaged in processing such products within a Province, is not affected by the fact that the resulting product may be exported, although it is obvious that the scale of such wages would have a significant effect upon the export price.
>
> It is the immediate effect, object or purpose, not possible consequential effects, that are relevant, in determining whether *The Farm Products Marketing Act* of Ontario and the three schemes adopted under it, which are the subject of the present reference, are laws in relation to a matter falling within Provincial legislative competence. As Viscount Simon said in *Attorney-General for Saskatchewan* v. *Attorney-General for Canada et al.*...
>
> "Consequential effects are not the same thing as legislative subject-matter. It is the 'true nature and character of the legislation' — not its ultimate economic results — that matters."

1 [1957] S.C.R. 198, 204.

2 [1957] S.C.R. 198, 209-10.

3 [1957] S.C.R. 198, 231-32 and 266.

4 p. 256, Taschereau, J. shared in the opinion of Fauteux and Abbott, JJ. Cartwright, J. dissented

5 p. 262.

6 pp. 264-5.

Even if the opinion shared by Kerwin, Rand, Locke and Nolan, JJ. is considered as the more advanced, it still does not bridge the gap between federal and provincial jurisdictions,[1] since it is difficult to apply in those cases where the producer does not know the ultimate destination of his product. Rand, J. recognized this limitation when he stated:

> It follows that trade regulation by a Province or the Dominion, acting alone, related to local or external trade respectively, before the segregation of products or manufacture of each class is reached, is impracticable, with the only effective means open, apart from conditional regulation, being that of co-operative action; . . .[2]

Finally, it was held in the *Local Prohibition* case[3] that the regulation of commerce in Canada does not include the right to prohibit the movement of goods. According to the Judicial Committee of the Privy Council, the power to regulate commerce implied the preservation of the objects of commerce. However, there has more recently been some recognition by a majority of the Supreme Court of Canada of the fact that prohibition of some aspects of trade may be a means of regulation and thus within the federal trade and commerce power. The Supreme Court of Canada held valid part of section 5(a) of the federal *Dairy Industry Act* which dealt with the prohibition on importing margarine into Canada.[4] On appeal, the Privy Council was not asked to consider that question.[5] Recently, *in Caloil Inc.* v. *A.G. of Canada* and *National Energy Board and A.G. Quebec,* [6] the Supreme Court of Canada held valid a regulation of the National Energy Board, amended on August 12, 1970, prescribing that when the Board issues a license to import oil it can issue it "on the condition that the oil to be imported will be consumed in the area of Canada specified in the licence".[7] The regulation was considered to be "an incident in the administration of an extraprovincial marketing scheme".[8] Therefore, an import permit can be an instrument by which the products of international trade can be allowed to enter certain zones of Canada and not others, thus allowing the federal government to create internal trade barriers and restrict intraprovincial and interprovincial trade.

Moreover, the federal Parliament may successfully exercise a power to prohibit by invoking the general power "Peace, Order and Good Government",[9] the power over quarantine,[10] and the criminal law power.[11] An

1 Several criticisms have been made in this respect. Among others, see *Alexander Smith, op. cit.* pp. 139, 140, 141, 158, 159, 160.

2 [1957] S.C.R. 190, 214.

3 *A.G. Ontario* v. *A.G. Canada* [1896] A.C. 348.

4 *Re the Validity of section 5(a) of the Dairy Industry Act* [1949] S.C.R. 1, per Rinfret, J. at p. 25, per Taschereau. J., at pp. 44-45, per Rand, J. at p. 53, per Kellock, J. at pp. 67-68. and per Estey, J. at pp. 79-81. See also Duff, J. in *Gold Seal Ltd. v. Dominion Express Co. & A.G. Alta.* [1922] 62 D.L.R. 62, 80-81.

5 *Canadian Federation of Agriculture* v. *A.G. Quebec* [1951] A.C. 179.

6 [1971] S.C.R., 543.

7 Section 20 (3) of the Regulations of the N.E.B. (SOR/70-372)

8 *Caloil* v. *A.G. Can.* [1971] S.C.R. 543, 551.

9 *Gold Seal Ltd.* v. *Dominion Express Co. & A.G. Alberta* [1921] 62 S.C.R.424.

10 Section 91 [11], B.N.A. Act.

11 Section 91 [27], B.N.A. Act.

amendment in 1919 to the *Canada Temperance Act* prohibited the importation of alcoholic beverages into any province where its sale for local use was already prohibited by provincial legislation. This was held to be a valid exercise of the general power. This legislation was necessary in order to reinforce provincial prohibition laws as the provinces could only prohibit the sale of alcoholic beverages within their territory but could not prohibit their importation into the province, this being a matter of interprovincial trade. The court found that the trade and commerce power might not be applicable, but that the general power could be used to validate a federal law whose effect was to block the movement of goods from one province to another.

Whether the possible inability of Parliament to use the trade and commerce power to regulate and prohibit trade can be adequately compensated for by other enumerated federal powers depends, of course, on the scope accorded to the latter. We shall consider later whether more enumeration is desirable in a new constitution rather than relying on courts of law for further clarification of the meaning of existing, but generally worded, powers.

The Power of the Provinces over their Natural Resources[1]

The power of the provinces over their public property gives them a most effective weapon for controlling their economic destiny. Ownership of a substantial part of the mineral rights in lands granted to individuals is reserved and vested in the Crown in right of the provinces. The right to explore and to drill is normally allowed under permits which sometimes also tend to control the upgrading of raw materials destined in large part for the international market.[2] Some provinces have even indulged in activities that extend outside of Canada and have met directly with foreign governments or states to discuss outside markets. For example, the government of Saskatchewan in 1970 held discussions with the State Government of New Mexico with respect to potash marketing. A year later, the government of Alberta negotiated with representatives of foreign producers, including the representatives and agents of foreign governments, with respect to market-sharing and price-stabilizing arrangements for sulphur. These two developments will be examined further in section 5 below when external commercial policy is considered.

It is quite clear from the present case law that the provinces have an exclusive power in the exploration and conservation of their natural resources and that they can legislate in that regard. However, some

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1 See Gerard V. LaForest, *Natural Resources and Public Property under the Canadian Constitution* (Toronto, University of Toronto Press, 1969) and also H.V. Nelles, Empire Ontario: The Problems of Resource Development, in *Oliver Mowat's Ontario*, ed. by Donald Swainson, (Toronto, Macmillan of Canada, 1972).

2 See, for instance, *Lands and Forests Act* R.S.N.S. 1967 c. 163.

protective measures that have an important effect on interprovincial and international trade have been declared invalid.

The authority of the provinces over their natural resources may be stronger if the Crown owns those resources than if individuals do. In *Smylie* v. *The Queen,*[1] the Ontario Court of Appeal upheld regulations adopted under the authority of *An Act Respecting the Sale and Management of Timber on Public Lands* [2] which provided that any licence or permit to cut timber on Crown land issued after April 30, 1898 should be subject to the condition that all pine which might be cut into logs or otherwise should be manufactured into sawn lumber in Canada. It was held that this condition, known as the manufacturing condition, validly provided the terms on which the province would dispense of its public property. The matter was assigned exclusively to the provinces by section 92 [5].[3] It is still an open question whether such conditions could be attached by a province, perhaps on the basis of section 92 [13], to the exploitation of natural resources which have become the property of private individuals or corporations.

The case of *Spooner Oils Limited and Spooner* v. *Turner Valley Gas Conservation Board and the Attorney General for Alberta,*[4] illustrates that the provinces have authority to restrict the exploitation of natural resources, but that the courts have to perform the difficult task of determining in each case whether the provincial law in question is designed to preserve resources or whether it is designed to restrict interprovincial trade. In that case the Supreme Court of Canada considered Alberta legislation, the *Turner Valley Gas Conservation Act,*[5] which authorized a board to adopt regulations limiting the extraction of natural gas in that valley. Rejecting the company claims that the Act restricted interprovincial trade, the Supreme Court of Canada (through Duff, J.) held that, on the contrary, the Act was essentially intended to prevent waste since the natural gas market was not sufficient to absorb the total production. Without these measures, close to 90% of the gas extracted would be wasted.

It would seem, however, that the provinces cannot concentrate production or sale of goods in the hands of a board in order to monopolize the export of such goods outside the province. Therefore, laws such as the *Canadian Wheat Board Act* do not have provincial counterparts because they relate to interprovincial trade. *In re Grain Marketing Act.* [6] the Saskatchewan Court of Appeal considered a Saskatchewan law, *The Grain Marketing Act, 1931,* which created a cooperative with the exclusive power to purchase grain from Saskatchewan producers whether or not the grain was destined for

1 [1900] 27 O.A.R. 172.
2 61 Vict. ch. 9 (0).
3 See to the same effect, *Brooks — Bidlake and Whittall Ltd.* v. *A.G.B.C.* [1923] A.C.450.
4 [1933] S.C.R. 629.
5 S.A., 1932, c. 6.
6 *In re Grain Marketing Act* 1931. 2 W.W.R. 146, (Saskatchewan Court of Appeal).

international or extraprovincial markets. At that time, Saskatchewan was producing more than 60% of Canadian wheat exports. The province was consuming a very small portion of its agricultural products locally. The preamble to the Act recalled the state of economic crisis which had existed in the West in the 1930's and explained that it was necessary to adopt legislation in order to ensure larger markets for the sale of grain crops. Nevertheless, the Court of Appeal declared the Act invalid because it forced all local producers to become members of a cooperative which alone had the power to sell wheat. The legislation thus took away the producer's right to sell his grain on the interprovincial market. According to the *B.N.A. Act* this right could be regulated only by the federal government. In the case of *Re Sheep and Swine Marketing Scheme,*[1] the court considered a Prince Edward Island statute which had created a government board with the sole right to sell pork. Most of the production was intended for the interprovincial market. The Supreme Court of Prince Edward Island declared the Act invalid on the grounds that it restricted the rights of individuals to do business outside the province.

Similarly, a provincial act in the form of a tax on exports would be invalid. With a view to encouraging the lumber industry in British Columbia the provincial legislature passed a law taxing timber cut in the province while at the same time granting an exemption almost equivalent to the tax if the timber were used or processed in B.C. The Privy Council, in *A.G. for B.C.* v. *McDonald Murphy Lumber Co.,*[2] declared the law invalid on the grounds that it was taxing exports. Although the immediate effect of the law was to impose a tax on local timber, it indirectly acted as a stimulus to local industry by discouraging exportation of timber. In 1957, British Columbia used a similar strategy by passing two separate laws apparently intended to foster the creation of a steel industry in the Province. Under one law, iron ore mined in the province was heavily taxed; under the other, a premium was given for each ton of iron ore processed within B.C. The indirect effect of the law was to encourage the establishment of smelters in B.C. In *Texada Mines* v. *A.G. for B.C.,*[3] the Supreme Court of Canada found the law invalid because it was deemed to levy a tax on exports.

The provinces have a very important role in regulating the extraction and conservation of natural resources located in their territories, although the federal trade and commerce power imposes a limitation to their jurisdiction in that field. The *Smylie*[4] case suggests that this limitation is not as great when the provincial Crown is the owner of these resources, in which

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1 *Re Sheep and Swine Marketing Scheme* (P.E.I.) [1941] 3 D.L.R. 569.
2 [1930] A.C. 357.
3 [1960] S.C.R. 713.
4 [1900] 27 O.A.R. 172.

case some provincial laws may have far-reaching consequences on interprovincial and international markets. However, it is possible that even here the courts will further restrict the power of the provinces to impose conditions on trade in materials which are extracted from provincially-owned resources. The courts will have to consider in such cases whether the essence of the law is really the conservation and management of Crown property, or the regulation of interprovincial or international trade in the commodity extracted.

4. *The Constitutions of the United States, Australia and India*

It is instructive to compare the experience of some other federal countries on these questions. We shall attempt to describe briefly the constitutional provisions of the federations of the United States, Australia and India, focussing in particular on the various constitutional guarantees and judicial interpretations presently relevant to a common market economy. In particular, how have these countries struck the balance between the requirements of a national common market and the federal and provincial (state) legislative prerogatives to regulate economic affairs?

The United States

In the United States, ultimate power to control international and interstate trade resides with Congress (Article 1, ss. 8 and 10 (2),(3)). Under their residual power the states, in theory, have concurrent jurisdiction over commerce but, as will be seen, this power is greatly limited both by the Constitution and by the predominance of Congress in this area. In theory the states may impose charges on imports and exports; but since exercise of their power over "imports" or "duties" requires Congressional consent, the federal power in this respect is, in fact, exclusive. While Congress may, itself, impose duties, the constitutional guarantee of uniform duties (Article 1, section 8(1)) and non-discrimination among state ports (Article 1, section 9(6)) effectively defines a custom union structure.

The Constitution of the United States does not explicitly guarantee the free mobility of commodities. The concept of unrestricted movement of goods originates in case law. Since the famous *Marbury* v. *Madison*[1] decision, the Supreme Court's role as final arbiter of the Constitution has not been successfully challenged. Accordingly, the latitude afforded by judicial interpretation of the terms "commerce", "inter-state commerce" and "regulation" is especially noteworthy.

The commerce power in the United States has been steadily and significantly extended by judicial interpretation. For example, the list of regulatory powers bestowed by the *Commerce Act* and the *Sherman Anti-Trust Act,* to name two, indicates the wide grant of power to Congress as well as the

1. I. Cranch 137, 177 (V.S. 1803).

unrestricted interpretation of "commerce". The Supreme Court of the United States has held that such power was to be as broad as the economic needs of the nation and conferred upon Congress the power to seek realistic solutions to great national problems. [1] The Supreme Court has decided, in effect, that federal competency in relation to interstate commerce was to be exclusive for activities requiring a certain national uniformity and concurrent in all cases where diversity was deemed desirable in order to better serve local needs. However, state laws adopted in the latter case could be supplanted at any time by an act of Congress. On the other hand, through their residual power, the states could enact laws respecting the health, security and welfare of their residents although such laws were not to impede interstate or international commerce. The commerce clause, independent of any federal legislation, could be invoked in opposition to such impediments. The commerce clause could be used positively by Congress to promote commercial exchanges, while its existence alone was sufficient to neutralize state laws harmful to the flow of trade. If state laws discriminate against interstate commerce they are, *ipso facto,* invalid. Similarly, laws designed to favour local industries (i.e., protective laws) are unconstitutional. In short, if a matter affects both domestic and interstate commerce, the validity of the law will depend upon the particular circumstances. In Canada, because we do not start from the premise that federal and provincial powers are generally concurrent in this field, validity depends to a greater extent on ascribing laws to one or other exclusive legislative category. In seeking to determine the extent to which interstate commerce is affected by local transactions, the courts in the United States have relied upon the distinction between direct and indirect effects and whether or not such effects are "substantial".

Finally, the power to regulate has been interpreted to include the power to prohibit, such power extending to dangerous objects, matters contrary to public order and matters which affect interstate commerce.

In summary, the commerce power has been interpreted liberally by the courts both as to application and as to the subject matter comprising commerce. The distinction between interstate commerce and intrastate trade is a matter of degree. The courts have developed a construction for assigning to the federal or state governments competency in legislative matters based upon a balance between the requirements of national uniformity and the desire for expression of local needs. They have established that federal authorities may control intrastate transactions on the grounds that they affect interstate commerce, but only if "direct" and "substantial" effects exist. However, the states may regulate commerce on the grounds of local interest if the restrictions are not discriminatory or protective in nature and are not superseded by federal provisions. Since the

[1] *American Power and Light Company* v. *Securities and Exchange Commission* 329 U.S. 90, 104.

commerce power in the United States can be used positively by Congress to promote commercial exchange, economic integration through the commerce provision is more a question of the active exercise of powers than a guarantee of freedom from regulation.

> Unlike "freedom" of interstate commerce specifically mentioned in section 92 of the Australian Constitution, the "freedom" of commerce elected by the Courts under Article I:8:3 of the United States Constitution has always referred to the total flow of that commerce, being rather a "freedom" in the sense of the promotion of its general well-being.[1]

Australia

The Commonwealth Parliament has legislative jurisdiction over international and interstate trade (Australian Constitution, section 51 (i)). These powers are held concurrently with the states but in case of conflicting laws that of Parliament will prevail (section 109). The Commonwealth Parliament has exclusive jurisdiction over customs and excise (section 90) although the states may impose inspection charges on imports and exports (section 112). Since such charges may be annulled by the general legislature, federal powers in this area are virtually exclusive. Further, the constitution explicitly guarantees freedom of interstate "trade, commerce and intercourse" (section 92). It also prescribes uniform customs duties (section 88) and non-preferential tax treatment (section 99; section 52 (ii) (iii)). Accordingly, the written Australian Constitution goes further than its American counterpart in promoting the customs union-common market structure.

The Australian courts also figure prominently in defining the term "trade" and in determining the meaning of "interstate trade" as well as generally clarifying the exact scope of the commerce power. The commerce power has been interpreted broadly by the courts, beginning with the unrestrictive interpretation of the term "trade". That term has not been limited only to purchases and sales but has also been interpreted to refer to a field of activity, other than the mere physical movement of commodities, and to cover intangibles (energy, communications, visual signals, information and the like), goods, persons, as well as capital.

While the guarantee of free trade implied by section 92 is inapplicable to local or intrastate trade, the courts have greatly extended the scope of interstate trade within internal commerce. In ascertaining whether or not a local activity is connected with interstate trade, the procedure of the courts has been to consider the basic elements of a given activity. If an activity has a distinct interstate or intrastate nature, the courts draw the necessary distinction and thereby determine the appropriate jurisdiction.

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[1] Victor S. MacKinnon, *Comparative Federalism* (the Hague Martinus Nijhoff, 1964), p.50.

Production and manufacture of objects are not included as interstate trade. In the language of economics, the scope of interstate trade extends only to "consumption" and "exchange", but not to "production".

The general wording of section 92 guaranteeing interstate free trade has been interpreted by the courts as applicable to both the Commonwealth and state levels of government. In a series of cases this interpretation promoted, in effect, a free enterprise economy by establishing the rights of the individual to conduct business free from government intervention at both levels. The courts qualified this position by asserting that whether section 92 enters into consideration depends upon (a) whether the regulations are prohibitive or merely restrictive and (b) whether they affect interstate trade directly or indirectly. The exact point at which freedom of interstate trade becomes unduly restricted is essentially a question of fact. While regulation is thus deemed consistent with the guaranteed freedom of trade mentioned in section 92, prohibitive legislation is not.

Three elements must be mentioned in attempting to assess the relevance to the Canadian position of the Australian constitutional provisions. The size of the individual Australian states is such that there is less scope for interstate trade when compared to the American economy. In this respect Canada is more like Australia than the United States. With a large number of states in the United States, it is inevitable, other things being equal, that there will be more interstate trade. Secondly, the Australian Parliament has distinct and supplementary powers to legislate with respect to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state" (section 51 (XXXV)). Under this power, the Australian Parliament has been able to establish a court for arbitration, and it has been held that an award of the Commonwealth Arbitration Court may prevail over a state statute to the extent that the statute is inconsistent with the federal award. Finally, the Australian Loan Council, under which the independent powers of borrowing of both state and Commonwealth governments are subjected to control, leads to a great deal of federal-state harmonization in the capital sphere. While this was achieved, in part, by a constitutional amendment, it must be added that there was a succession of unsuccessful attempts to resolve other economic problems by constitutional amendment.

To summarize, the Australian Constitution effectively guarantees a common market structure while judicial interpretations of the term "trade" extend it to labour and, in some cases, to capital. The legal reading of the "free trade" provisions of section 92 have led to some emphasis on a free-enterprise approach to managing the common market.

India

India has borrowed heavily from the experience and jurisprudence of both the United States and Australia in framing its constitution. It has been operative for a relatively short period.

The Indian Constitution explicitly guarantees free interstate and intrastate trade (Article 301), extending this freedom of commerce to all individuals and not only Indian citizens. Citizens are further ensured the right to exercise their profession or trade (Article 19 (1) (g)).

The Constitution provides for exclusive national jurisdiction over foreign and interstate trade (List I (41),(42)) and exclusive state competence over internal trade (List II, 26). Certain commodities are treated as exceptions to the above; however, for these particular commodities, concurrent jurisdiction is exercised with federal paramountcy (List III, 33). Additionally, certain activities which in other constitutions are incorporated by judicial interpretation are specifically assigned *in toto* to federal jurisdiction even in the case of intrastate activities. This is the case for railroad and truck transportation, inland and international shipping, air transport, and banking, among others.

The Indian courts have followed the Australian and American approaches in interpreting the words "trade, commerce and intercourse" of Article 301 quite widely to include transportation and transportation facilities, movement of persons, etc. Similarly, the Australian example is followed in interpreting the freedom guaranteed in Article 301 as implying that neither level of government can adopt direct measures of constraint.

However, the Indian Constitution does not leave the governments powerless to legislate with regard to commerce. Parliament may adopt laws restricting commerce in the public interest, but such measures may not be preferential or discriminatory in nature. Discriminatory restrictions are permissible for purposes of national defence, where state subsidies are involved, or where an emergency "shortage of goods" exists. Since Parliament is the sole judge of whether or not a state of emergency is present, and since the courts may not intervene, the Constitution actually empowers Parliament to pass preferential and discriminatory legislation. (See Articles 302, 303, 275 and 303 [2]).

The states have limited powers and may impose "reasonable" restrictions of a local nature but such restrictions must be non-discriminatory and in the public interest, and they require presidential sanction. Further, the burden of establishing that the state law is both reasonable and in the public interest lies with the state. (Article 304 [a], [b]).

To summarize, the Constitution guarantees free internal trade and occupational choice for its citizens. Exclusive state jurisdiction extends only over internal state trade, qualified by certain intrastate activities specifically assigned to federal jurisdiction and certain commodities over which both the states and federal authorities may exercise control. Federal laws have priority in the event of conflict. The term "trade" is widely interpreted. Government regulation is compatible with free commercial intercourse. For a number of reasons, however, the states actually have very limited powers.

5. *Common External Commercial Policy*

Federal states as economic units are more than a free trade area among component members. They typically involve a customs union, that is, common barriers to trade with other states. They also have common monetary and other institutions, relatively free movement of labour and capital, and other characteristics which, together, give a still greater degree of economic integration in some form of economic union. Access to international markets and supplies, and to external sources of labour, capital and technology, has had important consequences for Canadian development. Consideration of the common market and economic union must be extended, therefore, to the appropriate degree of uniformity in external economic relations. This section deals with import and export policies and their constitutional implications. Some other aspects of external economic transactions will be considered later.

(a) Given the principle of an internal free market in a federal state, it appears *logically necessary* to have a uniform commercial policy with respect to other countries. The maintenance of different provincial commercial policies in trade with other countries would soon be unworkable. Different rates of duty, quotas, and other barriers to foreign trade would create many possibilities for deflection of trade, production, and investment among the provinces. To take just one example, the manufacture of products with a high proportion of foreign-made materials and components would shift to low-tariff provinces. There are various methods to avoid such deflection, all of which involve significant administrative costs if they are to be effective. Such independent commercial policies may be appropriate for independent states which desire simply a modest degree of integration via trade. Their relevance to a federal state with many common institutions and objectives, both internal and external, would seem small. The freedom of internal mobility of goods, labour and capital would not be long maintained if some provinces felt it necessary to protect their production, trade and attractiveness for investment against other provinces because of their independent foreign commercial policies. If the former responded simply by imitating the latter's foreign commercial policies, then they would lose their independence in commercial policy. The lowest tariff would tend to set the pattern.

It might be argued that this would be desirable in itself, given the comments in section 1, Part II on the benefits of exchange. A common tariff and other barriers to external trade imply a diminution of global trade. There is no necessary contradiction, however, between the gains inherent in a full economic union, on the one hand, and the gains possible from reducing barriers to trade with other countries, on the other. An economic union involves a great many common institutions, including a distinct currency. It can exist with any given level of common external tariff. There is no particular level which is relevant for all time to a federation. Such restrictions may serve various national purposes and may be difficult to remove or change rapidly when producers have become dependent on them. They are broadly recognized as economically undesirable over time, for reasons developed earlier in this paper on the benefits of exchange. It has been the general policy of successive Canadian governments over the past four decades to reduce such barriers to trade by agreed international action. This has also been the policy of many other economically developed nations, especially in the past few decades. In most cases this objective has been achieved by agreed multilateral reductions of tariffs. In some cases it has been done by several countries banding together in a free trade area; in other cases nations have gone farther by establishing a customs union. In western Europe there is an attempt to establish a common market in which there is not only a removal of restrictions on the movement of goods between the member states, but also an increase in the freedom of movement of labour and capital and some common institutions.

To preserve and extend foreign trade in this type of trading world, and to secure the benefits therefrom for the general Canadian interest, the central government of a federal state must have the power to negotiate improved access for its exports in foreign markets. In return, it must offer credible concessions in terms of access for foreign goods to its market. This means that the concessions offered should not be subject to impairment by the action of others within the federal state. For Canada, as a major trading nation, this aspect of the common market is particularly important.[1]

All of this points to a common external commercial policy for the Canadian federation exercised exclusively by the federal government, as at present. This would help ensure interprovincial free trade with all the attendant gains to the provinces and the federation as a whole. It would ensure the effectiveness of protection against external states insofar as this is considered to be in the best interests of the entire federation. It would ensure that meaningful concessions in the Canadian market could be offered to other countries in return for a greater scope for Canadian exports, thus serving both consumer and producer interests. Since external commercial policy

[1] An example of this type of difficulty occurs in the actions of provincial liquor control boards, as noted in section 3, Part III, on "non-tariff barriers".

is part of foreign policy, and since the latter is within federal responsibilities, there is an additional reason for continued federal jurisdiction over commercial policy.

It is clear from both logic and history that this arrangement, while in the best interest of the federation as a whole, is not of equal benefit to its members. The regional impact of a common commercial policy is uneven. With a given level of tariffs, each province would have opportunities for trade with the other provinces which would not be available in the absence of the tariff, but each province would also be cut off from trade with other countries which would be available were the tariff lower. The net effect for any one province could be negative.

Of course, there are offsets to this in a federal country such as Canada. There are the fiscal transfers and other policies designed to equalize opportunity across Canada, including economic opportunity. However, the uneven regional incidence of a common commercial policy does increase the special responsibilities of the federal government with respect to reducing regional economic disparities.

(b) In the preceding paragraphs it was indicated that full internal mobility of goods within Canada required a common external tariff policy. It is equally true, though perhaps not as readily apparent at first sight, that policy with respect to exports must be broadly harmonized if the full benefits of international specialization are to be achieved.

Throughout its history, major exports have helped sustain economic development in Canada. Like other industrialized countries, Canada, especially since World War II, has encouraged international specialization by tariff negotiations aimed at removing barriers to international trade. It was noted earlier that Canada cannot secure improved access to foreign markets for her exports unless she can offer concessions in the form of reduced barriers to imports. In addition, the tariffs and other restrictions abroad which impede Canada's exports of processed and manufactured goods in particular cannot be reduced except by a consistent and unified approach at the national level involving much more than tariff policy. Internally, for example, an export gain for one region of Canada because of tariff removal abroad may be accompanied by a production loss in another region of Canada because of tariff removal in Canada. Externally, successful penetration of a foreign market may lead to pressure by foreign producers for dumping duties or a wide variety of non-tariff barriers. Only a national government can hope to reconcile the first problem or counteract the second.

As was noted earlier, judicial interpretation has established that international trade is to be regulated by the federal government. Problems have arisen in this area, however, because of some imprecision and ambiguities over the division of power between Parliament and the legislatures in the

area of trade and commerce. Moreover, in exercising powers which they have in areas ancillary to interprovincial and international trade, the provinces have at times adopted measures which may impinge on federal jurisdiction while inadequately realizing provincial objectives and sometimes hampering national objectives. Some examples from the area of natural resources will help clarify the types of issues involved.

Historically, natural resources — including energy — have played a major role in the development of the Canadian economy, particularly through their importance in exports, their impact on Canada's international competitiveness in other sectors for which they are inputs, and their contribution to the development of certain regions. Many of Canada's natural resources are still exported in a relatively unprocessed form. To the extent that Canadians wish to export the resources rather than retain them for domestic use now or later, considerable scope exists for further efficient processing in Canada prior to exportation.

All of Canada's provinces have adopted general mineral acts. Two provinces, Ontario and British Columbia, have recently enacted new legislation pertaining directly to the upgrading of resource exports and some other provinces are apparently contemplating such action. In the case of Ontario, a recent amendment to the *Mining Act* (1969) has granted authority to the Government of Ontario to require mining concerns to process their output in Canada. In the case of British Columbia, the *Mineral Processing Act* (1970) enables the Government of British Columbia to instruct a mining company to ship up to 12½% of its output to processing plants in the Province.

Canada probably has a wider range of natural resources available for export than any other country, and is also regarded as a reliable supplier. Western Europe, Japan and, to a lesser extent, the United States are short of most of the resources Canada possesses. Thus, our natural resources can provide a substantial leverage in our future trade relations with the European Economic Community, Japan and the United States. This leverage can be employed in trade negotiations aimed at reducing barriers to Canadian exports of resources in a more processed or manufactured form, and possibly to achieve other basic trade and economic objectives.

It may be noted, for example, that the tariffs of many of Canada's trading partners are structured in a way which permits the free entry of raw materials but which imposes progressively higher duties as the degree of processing increases. Other obstacles to imports of processed and manufactured products, such as various domestic content provisions, may be even more difficult to alter. The exercise of Canada's bargaining power could require the close cooperation of foreign countries possessing similar natural resources.

To be effective, the leverage to be derived from the existence of the

resources requires a national approach to policy with respect to resource exports, especially with regard to their degree of processing in Canada. Provincial regulations are inadequate for the following reasons. First, in most instances Canadian natural resources are produced in more than one province. This clearly limits the extent to which an individual provincial government can unilaterally insist on a high degree of processing prior to export, since a foreign buyer can play one province against another if it wishes to import the resource in an unrefined form. Secondly, further provincial involvement in this area could significantly undercut attempts by the Government of Canada to encourage trading partners to import from Canada in a processed form. It is going to be very difficult, or impossible, for Canada to negotiate the reduction of foreign tariffs and other obstacles to exports of processed and manufactured goods if, for example, the Canadian government cannot guarantee to the importing countries both uniform and stable policy on our part. Finally, in the absence of uniform and stable national policy and regulation on the upgrading of natural resource exports, there would be serious impairment of Canada's ability to enter into agreements with other resource exporting countries with the object of attracting more processing to countries of resource origin.

Problems of stabilization of output and price are another example of the difficulties which have arisen in the resource area. Potash is one case in point. A world oversupply of potash emerged in 1968. This had a major depressing influence on prices throughout the world and particularly in North America where average prices fell by more than 50% between 1967 and 1969. This was of concern to Canada which, in 1969, was the supplier of about 20% of the world consumption of potash. It was of particular concern to the Province of Saskatchewan where this industry is located.

In 1970 the Government of Saskatchewan, under some pressure from United States interests and after discussions with the Government of New Mexico, enacted regulations under the *Saskatchewan Mineral Resources Act* to prorate production in the Province through the use of separate production and disposal licensing measures. Amendments were subsequently passed and came into effect on July 1, 1970. The amendments deleted the disposal license provisions, leaving only the production control provisions, and changed the minehead floor price of $18.75 (U.S.) from a mandatory figure to a suggested target. The constitutional validity of these regulations has recently been challenged in the courts on the basis that they may have as their effect the regulation of trade and commerce. The Government of Saskatchewan has also encouraged producers of potash to join an existing export marketing company which now accounts for all offshore sales.

It is worth emphasizing that the concentration of potash production entirely in one province gave that province a special interest in the outcome of attempts to correct the oversupply situation, attempts which appear to

have had some success judging by increased prices and value of exports. The federal government, moreover, did not become involved in seeking a solution until after substantial provincial commitment, when the available options had been reduced considerably. The comments here on where the decision-making power lies and should continue to lie with respect to the regulation of foreign trade in no way limits the development of better machinery for consultation to give effect to important provincial concerns in these matters.

Similar problems have arisen in the case of sulphur. Canada is now the largest exporter and the second largest producer of elemental sulphur. Most Canadian production is in Alberta where sulphur is extracted from "sour" natural gas prior to pipeline transmission. In future, an increasing volume of sulphur will be produced in other provinces as a result of pollution abatement. World sulphur prices fell sharply in 1969 and the world oversupply situation is expected to prevail for the near future.

To deal with this situation, the Government of Alberta negotiated market-sharing and price-stabilizing arrangements with representatives of foreign producers, including the representatives and/or agents of foreign governments. A meeting in Mexico in 1971 resulted in a "hand-shake" agreement on an acceptable price range and market shares for sulphur exporters from Canada and several other countries. Pursuant to these understandings, the Government of Alberta issued a policy statement on July 22, 1971, outlining its intention to control the quantities of sulphur put on the market through a system of inventory guidelines. The proposed scheme provided that sulphur production arising from environmental control would get priority of access to the free world's market. This would be to the detriment of major suppliers of sulphur from other sources. Alberta was one of the latter, and as much as one-half of its total production would have been stockpiled.

In certain respects, the sulphur problems parallel those which arose with respect to potash. In both cases (a) Canada is the world's largest exporter and Canadian producers are significantly more efficient than United States producers; (b) Canadian exporters have captured a rapidly increasing share of the United States market; (c) the United States industry has sought protection against these imports through import quotas and the threat of anti-dumping action; and (d) these threats have tended to bring pressure upon the provincial government concerned. The proposed Alberta action went beyond that of Saskatchewan with regard to potash in two important respects. First, the proposed stockpiling would have involved explicit regulation of disposal rather than production, the latter being the case in the revised Saskatchewan regulations. The result would have been a more obvious challenge to the federal power to regulate external trade. Secondly,

unlike the situation in potash, the oversupply situation is not expected to correct itself in the near future.

It is also important to note that the federal government became involved in seeking a solution much earlier in the process of international negotiation than was the case with potash. In close consultation with the Government of Alberta and the industry, the federal government convened two international meetings on sulphur in the latter part of 1971 with a view to finding continuing solutions to the oversupply problem. The newly elected Government of Alberta announced late in 1971 that it would not proceed with the stockpiling program introduced some months earlier by the former administration.

It should be emphasized that, in drawing attention to these particular cases, no challenge is intended to the proprietary rights of the provinces with respect to their natural resources. Moreover, the provinces play an important entrepreneurial role in the development of natural resources which is critical to regional development and of great benefit to Canada as a whole. However, these powers must be exercised in ways which do not limit the federal government in the exercise of its powers, particularly the power to regulate external trade. Otherwise, national objectives will be hampered and provincial objectives themselves less effectively realized.

(c) In situations like this, where both governments have important interests, a variety of options are available and necessary. First, it is difficult to resist the conclusion that some of these jurisdictional issues have arisen because of the failure on the part of the federal government to move quickly enough to develop national policy to deal with the problems involved. Some cases in point are the further processing of minerals and stabilization policies for major oversupply situations such as potash.

A second and related point is the absence of *general* federal legislation in the fields of both interprovincial and external trade (as distinct from specific legislation on such matters as customs duties) which would provide a basis for the federal government to develop policy in these areas. In the absence of such general legislation, and given problems which require action, there is a temptation for provinces to develop policies in their areas of jurisdiction with insufficient attention to extraprovincial effects. Another option, of course, is for governments to ask the courts to clarify the jurisdictional issues more fully. No doubt this option ought to be exercised in a federal state from time to time, but it is unlikely to obviate the need for general legislation to spell out the interpretations laid down by the courts.

A third important option is that of more systematic liaison between governments on problems of interprovincial and international trade. This is necessary, in part, to alert the other government to problems which will lie in its jurisdiction. Perhaps more important, it will help assure an early search

for joint solutions where such are necessary because of the division of powers, because of the impact on the other government, or because policy is thereby made more effective. In particular, where an exportable resource is largely, or entirely, concentrated in one province, early and close consultation between the federal and provincial government and, where applicable, with major consuming provinces would appear mandatory if jurisdictional confrontations are to be minimized. It should be understood that such consultations do not reduce the overriding responsibility each government has for its area of jurisdiction. Involvement by the province on the export side, to take the case just discussed, would not lessen the responsibility the federal government has for decision in the export area.

Even with improvement in all of these areas, it is important to have as much clarity as possible in the Constitution with regard to jurisdiction on trade and commerce. That should not only help reduce the risk of jurisdictional disputes, but should also encourage governments to assume their responsibilities in areas of policy clearly within their powers while lessening the possibilities of infringing on the responsibilities of other governments. This is a matter of increasing importance, given the growing trend to more planning for primary resource development, and the possible increase of jurisdictional conflicts. To put it more directly, the federal government cannot permit the erosion of its power over international or interprovincial trade because of actions taken by provinces with respect to natural resources. To permit a province to negotiate a special export arrangement for a commodity, for example, would not only open the door to other such arrangements, but it would also encourage controls on interprovincial trade in order to ensure consistency with the export agreement. It would greatly increase the difficulties of ensuring national commercial policy in matters such as ensuring consistent supply and fair treatment of domestic and foreign customers. It would complicate the difficult task of dealing effectively with corporations which are increasingly both multi-provincial and multi-national in their operations. Eventually it would jeopardize the capacity of the federal government to encourage international cooperation in securing fundamental solutions to trading problems. Such a situation would be to the loss of both the province and the nation.

The above raises the question of whether there is a need to re-affirm federal jurisdiction in international trade, export as well as import, with regard to natural resources as well as processed and finished items. It is true that a number of aspects of such power are now reasonably well established by judicial interpretation. The increasing need for planning with respect to natural resource development, however, suggests that there is an increasing danger of confrontation in this area unless the federal power in international trade is underlined and is given greater effect by general legislation on trade. Earlier and closer consultation should help ensure that the interests of the provinces are fully considered with regard to resources over which they

have important proprietary and regulatory rights with respect to such matters as extraction and conservation. We shall return to this in the concluding section of this paper once some related issues have been considered.

The freedom of internal trade and the common external policies form the basic structure of the federal common market in commodities. Along with the mobility of labour, to be considered below, and common monetary institutions, these are logically necessary to the federal common market and economic union. There are also a set of institutions which underpin the efficiency, and even the viability, of the federal state with regard to expediting trade and with regard to capital and labour mobility. These benefits would not be realized without these institutions. Provincial differences in these would merely erode the benefits of the common market and they are not directly relevant to satisfying the preferences of individuals. Some of these institutions will be considered in Part III.

Part III

Harmonization of Some Specific Areas

It was emphasized earlier that the economic gains from the common market will not accrue unless some minimal collective effort is made in other areas. What are the key areas where harmonization is necessary for the economic success of the federation? What changes does this suggest for the constitutional position of the present federal state?

The concept of harmonization in foreign trade has been used to define the obligation on independent states participating in a common market not to use other policies to nullify the economic consequences of eliminating trade barriers. It also refers to changes necessary in these other policies in order to facilitate the achievement of efficiency in the common market through free trade. The concept needs to be enlarged somewhat for an existing federal state operating with a constitution that is based in substantial part on exclusivity or paramountcy in the division of powers. The most direct way to do this is to distinguish those areas of harmonization which are *economically necessary* to the operation of the common market from those which are simply *desirable* and to examine the implications of each, but especially the former, for federal and provincial powers.

We have already discussed those areas of policy or economic functions in which it is *logically necessary* to harmonize, namely those which relate to the formation and preservation of the structure of the common market and economic union. To deny harmonization in these areas is to deny, in effect, the defining characteristics of the common market-union of the federal state. Areas of policy in which it is economically necessary to harmonize are those which must be undertaken to ensure that the common market works effectively and is viable in practice. They also include such areas as those in which it is highly improbable that the desired degree of co-ordination would be evolved from federal-provincial consultation and bargaining. Competition policy is a case in point. To this end, a more certain guarantee of harmonization is required; consequently, the associated institutions are

deemed economically necessary to the common market. A third range of functions can be designated in which harmonization is economically desirable in the sense that the community's welfare would be increased in some ways, but is not absolutely necessary for the existence of the common market. For these functions, harmonization is desirable for greater economic efficiency, but such harmonization may be at the expense of other economic or non-economic considerations. It is important to repeat that only certain economic functions which bear directly on the common market, and mainly on goods, are being considered at this point.

The difficulty of reconciling free internal trade with the regulatory powers of governments points up sharply the need for harmonization. Much of Canadian constitutional history revolves around this point, as was noted in section 3 of Part II. A more detailed comment on one industry will help clarify the broad range of issues involved. This section will begin, therefore, with a discussion of the problem of agricultural marketing. It will then be suggested that, in certain areas, harmonization of policy is economically necessary to the degree that it should be entrusted to the general government if the common market is to be effective in practice. Finally, we shall deal very briefly with certain areas of policy where exceptions exist to the common market principle. Because other objectives are important, or the issues are not critical to the common market, in these cases harmonization may be a matter of better policy co-ordination rather than constitutional change.

1. *Agricultural Marketing Legislation: A Case Study*

In most contemporary economic unions and countries, many sectors of agriculture have received special treatment with respect to the internal and external market. This is so for a variety of reasons, ranging from the characteristics of the industry to social views regarding the role of agriculture. These have led governments and farm organizations to intervene in the markets for agricultural products in varying degrees in an effort to control or moderate market forces and their impact on resource allocation, the organization of the industry, and on farm income. Apart from the issues raised for agricultural policy, such intervention is of direct concern here for the light it throws on the problems of reconciling regulation with internal free trade.

Since the latter half of the nineteenth century, Canadian farmers have sought, through collective action of various kinds, to increase their share of the price consumers pay for farm products. Such action has been directed to handle the following concerns:

(1) Seasonal surpluses which depress prices at time of delivery, and longer-term stabilization.
(2) Distribution of products to alternate markets in a manner designed to obtain maximum returns.
(3) The lack of bargaining strength when dealing individually with buyers.

The first cooperative action taken by farmers was purely voluntary. Following the drop in farm prices during the nineteen twenties, pooling-type cooperatives with their ironclad membership contract developed in several parts of Canada in an effort to increase farm incomes. These cooperatives did not prove fully successful. Complete control of the market was not achieved: non-members, without shouldering any of the burdens of responsibility, were in a position to take advantage of any benefits in price resulting from the actions of the cooperatives.

During the depression of the nineteen thirties farmers pressed for legislation that would bring about more orderly marketing of agricultural products. In 1934, the *Natural Products Marketing Act* was passed. This Act set up an organization patterned on one originally developed in Queensland, Australia. The essential feature of this legislation was that where the majority of the producers of a commodity wished to sell their produce collectively, the minority would be compelled by law to conform.

The *Natural Products Marketing Act* provided for the establishment of a Dominion Marketing Board with wide powers, including the power to delegate its powers to local boards organized by producers. In the brief two and one half year history of the *Natural Products Marketing Act,* some 22 marketing schemes were approved across Canada. The validity of the federal Act was questioned in 1935 and the Supreme Court was asked for a ruling. In 1937 the Privy Council declared the Act *ultra vires* on the grounds that it infringed on provincial jurisdiction over matters of property and civil rights.

Provincial marketing boards were then created. By and large, the courts upheld the validity of these boards. It is clear from the early decisions that they were restricted to control of intraprovincial trade. Then, in 1949, the *Agricultural Products Marketing Act* was passed by Parliament. By this Act the Governor in Council was authorized to grant to provincial marketing boards the same type of powers with respect to provincial produce sold in interprovincial and export trade as the boards already exercised with respect to such produce sold in intraprovincial trade.

Financing was a problem for these boards, as was the attempt to pool returns to producers. A provincial board can impose license fees for operating costs, but attempts by provincial boards to impose a levy on one group of producers in order to increase the return to another group have generally been considered by the courts to be an indirect tax and the

granting of such power to a board by a provincial legislature to be *ultra vires.* As a result of this line of ruling, the *Agricultural Products Marketing Act* was amended in 1957 to provide that the Governor in Council could authorize provincial boards to impose indirect taxes and use the funds from such levies for all purposes of the board including equalization of returns.

The provincial legislation, with the support of the *Agricultural Products Marketing Act,* appears to give provincial boards all the powers they need to regulate products produced within their provinces regardless of where the products are going. As of September 1, 1970, fifty-nine provincial marketing boards had their provincial powers extended into interprovincial and export trade. These included boards in all provinces except Newfoundland. In addition, five provincial marketing boards had authority under the *Agricultural Products Marketing Act* to collect levies.

Court decisions have clarified the following points with regard to agricultural marketing legislation:

(1) The federal government normally has not the authority to regulate the intraprovincial movement of products, but provinces have such authority.
(2) Provinces have not the authority to regulate the interprovincial movement of products, but the federal government can extend interprovincial powers to provincial boards.
(3) Provinces can charge license fees under a marketing scheme to defray costs of regulating a product and to increase the general funds of the province (direct taxation), but cannot charge a levy for price adjustment purposes (indirect taxation).
(4) A system of pooling of returns under a provincial marketing scheme was held to be valid.
(5) The regulation of a product delivered within a province was considered to be within the competence of provincial legislation even though, after processing, most of the by-products moved into interprovincial trade.

There is one significant weakness in the legislative framework by which provincial boards were created and federal powers over interprovincial trade were extended to such boards. Producers and provincial governments recognized that there was no direct control to assure that one provincial board would not act to the detriment of other provinces. While there had been interest in national marketing structures for a number of products for some time, it was the situation in poultry and eggs which led to a request that the federal government enact legislation providing for such structures.

Initially, the federal government considered a specific request from egg producers for a national egg board. When this was followed by a request

from broiler producers for a similar structure it was decided to introduce legislation which would enable the federal government to establish national farm products marketing agencies for any commodity where producers and provincial governments had expressed a desire. This legislation was passed in January, 1972.[1]

There are now about 120 agricultural marketing boards in Canada. Many are concerned with such matters as product promotion and research and do not have such powers as price fixing, production quotas, or controls on imports from other provinces. It is instructive, nevertheless, to consider the problems of the egg and poultry boards, for they pinpoint the economic, administrative and constitutional issues involved in marketing.

The first egg marketing board in Canada was set up in Ontario in 1965 because of dissatisfaction with fluctuating and low prices. Its functions were limited to product promotion and research. The Quebec Federation of Producers of Consumer Eggs (FEDCO) was formed in 1966. In 1967, Quebec producers voted overwhelmingly in favour of setting up a marketing plan for eggs. By 1969 egg production was rising in Canada and prices sagging. The situation which existed early in 1970 was that about 40 per cent of all eggs produced in Canada were produced in Ontario. Producers in Quebec supplied about half of the Quebec market. Ontario producers were the most important source of the remaining half, shipping one fifth of their output to Quebec. Manitoba producers also shipped to the Quebec market.

In May, 1970, an agency marketing scheme was introduced by FEDCO. All eggs sold in Quebec, whatever their origin, were to go through sixteen grading stations, with FEDCO as the overall broker. In effect, no eggs were to be sold in that Province except through FEDCO. A price for eggs to the retailer was established, and FEDCO announced it would buy from sources both inside and outside the province.

This system ran into considerable difficulties. At times the price set by FEDCO was 14 cents a dozen higher than in Ontario. Even after the difference was cut to four or five cents, "bootlegged" sales directly to retailers from outside the province were encouraged by this difference, by the 12 cents per dozen fee charged by FEDCO, and by a growing surplus of eggs in Ontario and Manitoba. (Excluded here are certain cartoned eggs which were permitted by FEDCO to be shipped directly from producers in Ontario to retailers in Quebec). It should be added that in May, 1971, the parent board of FEDCO, the Quebec Marketing Board, was given power to seize bootleg eggs, and provision was made for fines. Only a minority of the eggs sold in Quebec appear to have gone through FEDCO. These difficulties in administering this scheme in one province coincided with a severe price war and a glut of eggs in other supplier provinces.

1 Bill C-176, referred to as the *Farm Products Marketing Agencies Act.*

The Quebec legislation was unsuccessfully challenged in the Quebec Superior Court by the Quebec Food Council. The Government of Manitoba subsequently mounted a challenge by submitting regulations, alleged to be similar to those then in existence in Quebec, to the Manitoba Court of Appeal. The regulations were declared *ultra vires* by that court and, on appeal, by the Supreme Court of Canada in a judgement dated June 28, 1971.

At the same time, a similar set of problems arose in the market for broiler chickens, that is, birds weighing three to five pounds. Since 1965 the Ontario Broiler Chicken Producers Marketing Board has set production quotas for all producers, based on their immediate past production, as well as prices to producers. While this has regulated supply within the province it could not protect Ontario producers from out-of-province producers, notably those in Quebec. In other words, the provincial production quota system could work only so long as major retailers did not substantially increase their out-of-province imports from any cheaper source. In Quebec there was no such marketing board until recently. Production expanded rapidly in Quebec, particularly during EXPO, and Quebec became the largest producer of broilers in Canada. Given the attempt by other provinces to maintain producer prices, the freedom from such limitations in Quebec, and some comparative advantage in broiler production, Quebec producers were able to make significant inroads into the market in eastern Ontario simply by pricing slightly lower. In March 1970, the Ontario broiler board significantly increased production quotas in an attempt to stem the inflow and to recapture some of the eastern Ontario market. Quebec producers responded in kind and prices were reduced to, or below, production costs. In September 1970, the Ontario government gave the producers board the power to require permits for retail sales and stickers of approval for imported birds. The board could ask the removal of birds, and provision was made for fines.

During the last six months of 1970, restrictions on interprovincial trade in poultry and eggs proliferated across Canada as some governments alleged that others were operating provincial regulations in a discriminatory fashion with respect to out-of-province shipments, and as prices declined and supplies rose. These controls, in brief, prohibited the sale of out-of-province products within the province unless such sales were covered by a permit issued by the local board and the product bore identification tags. By February of 1971, seven provinces had such regulations for broilers, three had regulations for turkeys, and four had regulations for eggs.[1]

These orders had effectively reduced, and in most cases stopped, the interprovincial movement of eggs or poultry meat. The negative effects on provincial prices of this backup in supplies, combined with the continuance of some interprovincial shipments, subsequently led to further tightening of

[1] These figures do not include the Quebec egg plan and the special egg regulations in Manitoba which were a test of these plans.

controls on interprovincial trade. Some broilers continued to be shipped from Quebec to Ontario without permit, for example. In April 1971, the *Ontario Farm Products Marketing Act* was amended so that the marketing board could authorize local boards for a particular agricultural product to seize products imported without a permit. The Ontario broiler board was so authorized, and did exercise this power. In the meantime, Quebec broiler producers, like poultry and egg producers elsewhere, experienced large surpluses and price decreases as a result of their inability to export to other provinces. They responded by forming a broiler producers marketing board with production controls at least as strict as those in Ontario.

Beginning with the summer and fall of 1971, the situation improved somewhat, partly as a result of efforts at interprovincial agreement. With the passage of the *National Farm Products Marketing Act* in January 1972, attention focused on negotiations to establish national marketing agencies for poultry and eggs.

In the case of eggs, the establishment of the Canadian Egg Marketing Agency was proclaimed in December 1972 under the *Farm Products Marketing Agencies Act* and became operational on June 1st, 1973. The establishment of the agency received approval in principle by all provincial marketing boards except that of Newfoundland which was awaiting the report of a Royal Commission on its egg industry. Newfoundland officially joined the plan on May 10, 1973. In April of 1973, the Government of Ontario announced that there would be a new Egg Marketing Board in that province to allocate among Ontario producers the provincial egg quota proposed under the national scheme. The national plan involves supply management of eggs based on a five year average of production. Eggs will move freely between the provinces on two conditions, viz: first, eggs moving out of a province must be within the allowed provincial allocation; second, such eggs must not be priced below the price in the province of origin plus cost of transportation. In June 1973, one province, however, had not yet implemented the provincial part of the federal-provincial agreement of the egg plan due to that province's desire for further study and clarification of particular aspects of the national plan.

The experience with agriculture points to three general issues of interest to this paper — the economic, the administrative, and the constitutional issues. The economic issue is the desire to ensure that the incomes of agricultural producers are sustained in an industry when prices are highly variable because there are many producers and output can often be expanded rapidly. This producer interest has to be reconciled with a consumer interest which calls for reasonable stability of supply at prices which reflect the rapid advance of technology in this industry and, in particular, the opportunity for specialization and exchange which a common market in Canada presents.

The administrative question is that of most efficiently achieving these objectives in cases where a departure from free market techniques is desired. A variety of techniques are available if farm marketing, production and pricing schemes are used, techniques which have quite different effects on prices, production, and any net subsidies involved. There are also alternative or related methods, such as direct income supplements to particular groups of producers, or agricultural and regional development schemes.

Whatever the preferred technique or combination of techniques, it is clear that independent action by provincial boards is self-defeating and poses serious constitutional questions at times. The restrictions on interprovincial shipment of eggs and poultry aggravated efficient producers' problems as surpluses accumulated. In such cases, consumers temporarily enjoy lower prices but pay more as efficient production from other provinces is blocked. In the long-run both producers and consumers lose as the market becomes fragmented and the scope for specialization and efficiency is severely narrowed.

It is true that each province has the constitutional power to regulate its internal market so long as it does not discriminate between provincial and interprovincial sales or regulate interprovincial trade as such. The problem, as with international trade, is that it is extremely difficult at times to determine whether discrimination is taking place. There are many ways in which a provincial marketing board could discriminate in favour of its producers while appearing to meet the letter of a constitutional requirement against discrimination. It could require a grading system for eggs, for example, which differed from that used by other provinces, thus requiring some regrading and resorting for at least some of the eggs moving into its market. It could require that a different grade of paper be used to package the imported eggs. It could require that imported eggs be stamped, preferably egg by egg and with a heavy stamp. Some of these devices would be unconstitutional, but it is not difficult to imagine many others and it is often a problem to determine whether they are being used in a discriminatory way in practice.

Direct Controls in General

The problem posed can be considered with regard to direct controls in general, for it raises questions beyond the agricultural industry. [1] Assume that provincial governments operate direct controls in their given "internal" markets by controlling or subsidizing the prices of the products concerned or

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[1] See J.E. Meade, H.H. Liesner, and S.J. Wells, *Case Studies in European Economic Union* (London, Oxford University Press, 1962) Introduction and pp. 102-128, for an analysis of this point in the context of Benelux in particular.

by limiting in one of a variety of ways the amounts to be produced or consumed. If one province subsidizes a product more heavily than the others, and assuming the product is otherwise freely exchanged, that province will tend to be a more attractive locale for production of the product. Of course, there are many other reasons for locating production in one setting rather than in another, but the point is not obviated thereby. Similarly, a province would have considerable difficulty in maintaining the price for a product by restricting the output of its producers if the producers of other provinces were free to produce without regulation and to ship into the first province. The less regulated or more competitive structure of the other provinces' industries would tend to impose itself on the first which would then be drawn to provincial import controls. Such differences in direct control mechanisms, given the differences in (and effects on) competitive power, can lead to endless complications for products which are cheaply transported; this is particularly the case where supply is rapidly expanded and where technical change is also rapid. There can also be complications in the international trade in such products as a result.

To be consistent with the common market, the province which regulates the internal market for such traded products would have to impose any price or production controls, or marketing techniques, equally on provincial and extraprovincial sources.[1] As noted above, it is often extremely difficult in practice to know whether a particular marketing or production program is discriminatory. There are endless variations in pricing practices, packaging, marking, grading, delivery requirements, and so on, whose relative effects on provincial and out-of-province producers may be almost impossible to determine. If the policy is non-discriminatory, however, the provincial marketing agency would be supporting the output and incomes of non-provincial producers. Let us assume that the province decides to go ahead on a truly non-discriminatory basis in spite of this. If the province was producing 70 per cent of its consumption of a product and importing 30 per cent from a second province, it could impose quotas which kept imports at 30 per cent of consumption. It could also follow other practices — there are many, depending on the product — to be consistent with this. There are innumerable problems the province would run into, assuming it had got this far. For one thing, technical changes (broadly construed) in the industry may not fall equally on the two regions over time, so that the 30 per cent quota on imports may look low or high. This change could be swift where technical change is rapid. It seems unlikely that the quotas would be changed to reflect this with any speed, especially if the relative change in efficiency favoured more imports. For another, if the marketing and pricing techniques of the exporting province differ, they could affect the relative competitive

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1 This might still be unconstitutional, however, since it could be taken as regulation of interprovincial trade.

power of that province's producers and thus put pressure on the quota. Third, market effects could affect supply and prices in either province with spillover effects into the other. Given borders which are otherwise free and a widespread location of many producing and distributing units so that intraprovincial surveillance is difficult, bootlegging will spread, as will the pressure to increase surveillance both on the border and internally.

It seems apparent that a provincial quota scheme, or its equivalent, and the attendant production and/or pricing schemes are unlikely to work well unless other provinces also have them. Otherwise, there is a constant temptation for producers elsewhere to undermine the price structure. If other provinces have different schemes in terms of pricing effects, similar problems arise in practice. Thus, if marketing schemes with production or pricing controls are to be introduced for any given product, a national scheme seems the only workable alternative. In a national scheme, moreover, it is easier to attempt to reconcile consumer and producer interests to the ultimate benefit of both. Regional specialization in the larger market permits each area to achieve efficient scale in products where it has or can develop production, while ensuring its consumers of low prices. Given a national scheme, it is true that a particular region may not be more self-sufficient in some products but it can achieve larger markets in others. It is also true that problems of adjustment will persist for some of the producers involved, but both federal and provincial governments are able to provide assistance to such producers.

It bears emphasis that there is a larger issue here which has to be faced squarely in any scheme, whether federal or federal-provincial. There is a distinction between regulation (as distinct from a free market solution) whose purpose is to achieve an efficient allocation of resources and regulation whose purpose is to reinforce a purely provincial market. For products which are easily transportable, the latter amounts to a denial of a common market for goods, whether it is achieved by federal regulation alone, by federal-provincial regulation, or by the federal government permitting or empowering others to regulate. Whatever the other objectives of regulation, one should keep clearly in mind the need for an efficient allocation of production within the common market, rather than simply within provincial borders.

Whatever the prospects with respect to agriculture or other industries, the overall relevance to the common market in goods should be emphasized. The problems have arisen essentially because of unwillingness to permit a competitive outcome in resource allocation, plus inability to mount an effective nationwide regulatory scheme where regulation is preferred. The effect is to put a heavy load on government-to-government negotiation and on the achievement of continuing consistency of divergent provincial schemes as economic conditions change. Once the need for consistency of

regulatory schemes is recognized for products which are substantially traded interprovincially, and which in fact form a common market, the case for federal regulation has been made in terms of effectiveness of policy.

If some of the non-tariff restrictions noted in this section are to be avoided, it may be necessary to have a stronger statement via section 121 of the *B.N.A. Act* on the unacceptability of barriers to internal trade. However, this is essentially a passive statement against barriers. If the state is to play a regulatory role where this is deemed desirable, it would be a mistake simply to leave the matter there; indeed, merely strengthening 121 could reduce the regulatory powers of the state. The preceding comments suggest that the federal government should also have a stronger trade and commerce role, or the equivalent in some other sections of the written constitution, if the state is not to be incapacitated in its regulatory role. A stronger federal role will ensure that such policies are more likely to be effective. Since the federal government has a country-wide constituency, it can be expected in such areas of trade and commerce to favour policies which are directed to the efficiency of the overall common market. It will also help assure, as noted earlier, that such policies of regulation are not inconsistent with effective federal action in foreign trade policy. Finally, it will reduce the temptation, and perhaps the necessity, which now exists with divided jurisdiction to place the focal points for regulation at provincial borders. This often makes little sense where economic regions overlap provincial borders. It also tends indirectly to preserve the provincial markets for trade which Confederation was intended to enlarge.

2. *Common Institutions of the Canadian Common Market*

It was emphasized above that internal free trade and a common commercial policy are *logically necessary* to secure the common market aspects of a federal state. Certain other institutions are so closely linked to the effectiveness of the common market, and the practical problems involved in divided jurisdiction with respect to these institutions would pose so many problems for the common market, that they may be described as *economically necessary* to its existence. Two of these will be considered in this paper; namely, competition policy, and patents, trademarks, and copyright policy. [1]

These common institutions involve forms of state regulation designed to make the common market work more effectively. They help assure that the gains through competition are realized in practice; that major impediments to trade, other than tariffs, are standardized; and that temporary exceptions to competition, such as patents, are uniform.

[1] These are by no means the only areas which fit this description. For example, certain aspects of standards and consumer protection, as well as of transportation, are also relevant, but are not considered in this paper.

Competition Policy

Competition policy deals with combines, mergers, monopolies, and restraint of trade. It covers both price and non-price forms of competition. Its purposes can be partly those of broader social policy, such as the diffusion of power and the prevention of inequities in income distribution. A major objective has been the encouragement of more efficient use of economic resources, in both senses of the term efficiency. First, competition policy can act as a spur to efficient production, to innovation, and to encouraging the movement of economic resources into new and more rewarding patterns of use. Second, it can help to ensure that expanding production occurs in accordance with consumer demands. However, even where competition can be made effective, it does not necessarily solve many problems associated with industrial performance. Hence, other social control mechanisms are used, such as regulation and state ownership. Nevertheless, in many markets there is substantial reliance on this mechanism to secure efficient performance. Where competition policy can be effective, it may be regarded as the least regulatory form of social control.

The relationship of competition policy to the common market can be shown by referring to the earlier discussion of the gains from exchange. In the absence of government barriers to interprovincial mobility of goods, and insofar as transfer costs permit, it was assumed that producers *would* move beyond their local markets and consumers *would* have supplies from other than their local sources. These, in turn, would secure the gains noted. If private restrictions on production and distribution prevent such mobility, the gains from exchange are lost.

One would normally expect more competition with a larger market area than with a smaller one. Some local firms may cease to exist as the market expands, but in a larger market area there are more competing firms, and more of an efficient size. However, in a number of industries, the expanding national market is accompanied by a decreasing degree of effective competition, because the costs of entry into production or distribution are rising, because technology reduces the number of firms and makes collusion easier, and for a variety of other reasons. In other cases the increase in competition is less than one might expect given the larger market. In such circumstances, and particularly where tariff policy bars import competition, the need for a strong competition policy is even greater if the benefits of the common market are to be realized.

Competition policy can be used most effectively to support the common market if it is within federal power. With mobility of goods, it is quite unrealistic to attempt to maintain diverse provincial competition policies. The more competitive structure of industry in one or more provinces would tend to impose competitive conditions on the other

provinces. In such circumstances, any provincial authority which was more tolerant of monopoly or combinations than other provincial authorities would be forced to resort to protection against interprovincial imports and might be tempted to subsidize interprovincial exports. By contrast, the point of a federal common market is precisely to allow consumers and producers anywhere in Canada free access to supplies and markets across Canada.

A further reason for a national competition policy is the strong tendency for more of the total output of goods, and increasingly of a number of privately-supplied services, to be produced by national and international corporations. In the century since Confederation, the businesses which account for the bulk of production have moved steadily from regional and local to inter-regional, national and international markets. This reflects the opportunities presented by the growing income of the common market; a series of major technical changes in transportation, communication, and the organization and distribution of output; and perhaps some difficulties of past competition policy. In recent decades, in particular, there has been a further internationalization of production through parent-subsidiary relations cutting across one or more national frontiers, a process which has gone much further in Canada than in other developed countries. Only a national (in some respects, international) competition policy can hope to deal with the competition problems of these developments. Finally, it should be noted that external commercial policy and competition policy can reinforce one another. For example, one important principle of competition policy is to ensure to a buyer in any given industrial situation an adequate number of real options, whether from within Canada or from outside. The penetration of export markets, to take another example, may involve some partial and temporary exemption for the exporters from regulations on mergers or other practices. In brief, external commercial policy and competition policy are, or should be, closely associated in practice, expecially in an economy as open as Canada's.

It is not surprising in these circumstances that legislation on competition policy, as defined above, has, in Canada, almost entirely been federal. No province in the past has shown any significant desire to legislate or enforce law in this area. The problem is that the legislation now in existence is not inclusive enough or flexible enough for an economy with Canada's present characteristics. Revisions are now under consideration. A brief outline of the historical development of competition policy will point to the problems which have led to proposals for change.[1]

(*a*) Parliament passed an Act in 1889 prohibiting conspiracies and combinations in restraint of trade. The provisions of the Act were

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[1] The following historical outline is based on Bruce C. McDonald, "Constitutional Aspects of Canadian Anti-Combines Law Enforcement", 47 Canadian Bar Review, 161 (1969) pp. 172-184. See also *Interim Report on Competition Policy, op. cit.*, ch. 4.

incorporated into the *Criminal Code* in 1892 as indictable offences. The first *Combines Investigation Act* was passed in 1910. Of significance, it added the words "merger, trust or monopoly" to the earlier Act. It was re-enacted in 1923 and considered by the Judicial Committee of the Privy Council in 1929, as explained below. In 1919, Parliament passed the *Combines and Fair Prices Act, 1919,* which was the most ambitious Canadian experiment at combines and price control. It was prompted by the *"Profiteering Act"* adopted in England in that year, by the undesirable economic effects of the war, and perhaps also by the United States *Federal Trade Commission Act* of 1914. An accompanying statute created a court of record called the Board of Commerce of Canada to administer the *Combines and Fair Prices Act.*[1] Section 17 of this Act prohibited all hoarding of staple foods, clothing or fuel and also prohibited unfair profiteering with respect to those necessities. Section 18 empowered the Board to issue cease and desist orders which, in effect, could control price and profit levels for particular participants in particular markets. The constitutional validity of what was considered the essential element in the fair prices scheme, namely the authority of the Board to inquire and to issue restraining orders, was successfully challenged in a case which reached the Judicial Committee of the Privy Council. The Privy Council felt it could not uphold the legislation on the basis of the general power of section 91 since it did not feel an emergency situation existed, nor did the Privy Council feel it could be upheld on the basis of section 91 [2] since that section did not confer on the Parliament of Canada the right to legislate with respect to particular trades within a province. The criminal law power was also rejected as a basis of support for the legislation since the enactment was deemed not to deal with a subject "which by its very nature belongs to the domain of criminal jurisprudence".[2]

In 1923, Parliament enacted a new Combines Investigation Act which prohibited "combines" (mergers, monopolies or concerted arrangements). It provided a Registrar to look for and inquire into existing combines and those which were forming. The Registrar's report on each investigation would form the basis of any decision by the Governor-in-Council to alter the tariff, to seek revocation of a patent in the Exchequer Court, or to prosecute criminally. The constitutional validity of this Act, together with the section of the *Criminal Code* dealing with criminal prosecution, were tested before the Privy Council.[3] This time, the criminal law power was reinterpreted as giving Parliament a power to be understood "in its widest sense". The only test was "Is the act prohibited with penal consequences?".

Section 498 of the *Criminal Code* was amended in 1935 to bring price discrimination within the reach of public policy for the first time. During the

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1 These two acts replaced the 1910 *Combines Investigation Act,* which was repealed.

2 In *re The Board of Commerce Act 1919, and the Combines and Fair Prices Act 1919,* [1922] 1 A.C. 191.

3 P.A.T.A. v. *A.G. of Canada* [1931] A.C. 310.

depression of the thirties, there had emerged considerable concern about the large spread between prices received by producers and those paid by consumers. There was also concern that price advantages obtained by large buyers would result in discrimination against small competitors. A Royal Commission on Price Spreads had been set up to study the question and to make recommendations. Section 498A was subsequently added to the *Criminal Code* which made it an indictable offense for a supplier to discriminate against competitors of a purchaser by means of discount, rebate or allowance. The new legislation also covered territorial price discrimination and predatory pricing practices engaged in "for the purpose of destroying competition or eliminating a competitor". It was held *intra vires* by the Privy Council in *Attorney General of British Columbia* v. *Attorney General of Canada.*[1] Lord Atkin relied exclusively on the criminal law power. Neither the Supreme Court in its earlier dealing with the case, nor, later, the Privy Council considered the trade and commerce power. It was said that Parliament's discretion to decide, in the public interest, what acts ought to be regarded as criminal was indeed very wide. This power was limited only by the powers of the provinces as provided in the *B.N.A. Act,* with the court having the responsibility to decide, in each case, the genuine character of the law adopted.

In *Attorney General for Ontario* v. *Attorney General for Canada*[2] the Privy Council generally agreed with the supreme Court of Canada[3] that the *Dominion Trade and Industry Commission Act,* 1935 was a valid exercise of the criminal law power. This statute was also adopted to give effect to certain recommendations contained in the report of the Royal Commission on Price Spreads. The result was the creation of a commission which was to act as a co-ordinating agency in the administration of 27 federal statutes such as the *Patent Act,* the *Trade Mark and Design Act,* the *Unfair Competition Act,* the *Combines Investigations Act* and 23 sections of the *Criminal Code.* Section 14 of the *Dominion Trade and Industry Commission Act* enabled the Commission, after investigation, to recommend to the Governor-in-Council that the latter approve such private industry agreements relating to prices as would reduce "wasteful or demoralising competition" without causing undue restraint of trade in any specific industry. The Supreme Court of Canada held this section to be outside the competence of Parliament because it was not necessarily incidental to an exercise of the criminal law power and because it potentially included agreements entirely intraprovincial in nature and effect and not confined to the regulation of interprovincial or external trade. There was no further argument on the validity of this section when the other aspects of the legislation were brought before the Privy Council for consideration.

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1 [1937] A.C. 368.
2 [1937] A.C. p. 405.
3 [1936] S.C.R. 379.

In 1952, Parliament adopted what is now section 31 of the *Combines Investigation Act*. This provides that a court may issue a prohibition order, "in addition to any other penalty", on the application of an attorney general at the time of conviction for a Part V offense under that Act, or within three years thereafter. A dissolution order restricted to mergers and monopolies may be issued on the same basis. In *Goodyear Tire and Rubber Company Limited* v. *R.*[1] several rubber companies pleaded guilty to a conspiracy charge but opposed the Crown's application for a prohibition order to accompany the fine. The section was challenged as constituting an interference with the exclusive provincial right to pass laws relating to property and civil rights. The Supreme Court of Canada in a majority decision noted that the prohibition order was described in the legislation as a penalty, available upon conviction, and was valid since the power of Parliament extended to the prevention of crime as well as to the punishing of crime. The validity of the dissolution order upon conviction was not decided.

The last major case concerning the constitutionality of portions of the *Combines Investigation Act* ended with a unanimous finding by seven judges of the Supreme Court of Canada that section 34, prohibiting resale price maintenance, was *intra vires*.[2] The Court agreed with a majority in the Ontario Court of Appeal[3] who thought that the legislation was in substance criminal law and valid under section 91 [27] of the *B.N.A. Act* according to the tests elaborated by Lord Atkin in the *P.A.T.A.*[4] case and in the *Reference re Section 498 A of the Criminal Code*.[5]

(*b*) In terms of economic efficiency of production and distrubution, the impact of the *Combines Act* has been modest and uneven. It has been effective mainly in restraining collusive price fixing, resale price maintenance and misleading price advertising. Three major problems have severely curtailed the effectiveness of the present legislation. First, the Act has not been very successful with respect to monopolies and certain monopolistic practices such as price discrimination, and has been quite ineffective in preventing the reduction of competition through mergers. Second, criminal procedures are not flexible enough to allow for sufficient consideration of the economic effects of particular business actions. The establishment of the Restrictive Trade Practices Commission was an attempt to ensure that economic issues were given more emphasis, but the Commission has had to operate within the limitations imposed by the criminal law power. Third, the Act covers, for the most part, only commodity-producing and some commodity-distributing industries. In effect, slightly more than half of total

1 [1956] S.C.R. 303.
2 *R.*v. *Campbell* [1966] 58 D.L.R. (2d) p. 673 (S.C.C.).
3 [1964] 46 D.L.R. (2d) 83.
4 [1931] A.C. 330.
5 [1937] A.C. 368.

domestic output is in industries whose activities are largely subject to the Act. If we exclude industries subject to some form of public regulation or ownership (though not necessarily with respect to the matters relevant for competition policy), then about 20 per cent of domestic output is in industries which are not, in the main, subject to the Act or to some form of public regulation or ownership. This 20 per cent includes a wide array of service industries whose intangible products are such that the consumer often has difficulty in conducting an informed search for best value. In many cases, import competition is absent or limited because the service cannot be easily transported, and domestic competition may be limited for the same reason. Where import competition might be forthcoming from foreign institutions or their branches, as in a number of the finance sectors, this has been curtailed by federal and provincial legislation. Because of these characteristics, the need to apply effective competition policy to such industries is at least as evident as for commodity-producing industries.

The problems reflected here are partly constitutional in nature. Canadian anti-combines policy in the past has, to a substantial extent, been framed in terms of the criminal law power. The power of the federal government to enact criminal law is clearly provided for in the *B.N.A. Act* by section 91 [27] and by judicial interpretation. The courts have found the anti-combines laws valid mainly on the basis of this section, but supported those laws not characterized as criminal law by reference to other federal powers such as those over patents and tariffs. [1] In practice the heavy reliance on the criminal power has restricted the effectiveness of competition policy because offenders must be proceeded against when discovered and the Crown must prove guilt beyond a reasonable doubt to win its case.

There is little room in this approach for consideration of the economic *effects* of certain actions. Indeed, the courts have steadfastly declined to consider evidence relating to such effects. Certain activities are generally so damaging to the public that this procedure under criminal law, involving an activity which is an offence *per se,* is the most desirable one. This could apply to agreements to fix prices or to allocate markets, for example, and to misleading advertising. In other cases such a procedure is far too rigid, since the activity may have desirable or undesirable effects depending on the circumstances. One example is agreements between firms on such matters as exports or specialization of production, and another is the entire question of policy on mergers. One approach to such cases is to register and review such agreements or mergers with a view to determining whether in fact they lead to benefits which are realized and passed on to the public or whether they simply restrict competition with no such benefits. Procedures under civil law

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1 See Peter H. Russell, *op. cit.*, section 12, pp. 89-97.

permit such flexibility in a way which is not possible under criminal law.[1] In addition, in both criminal and civil proceedings, the use of such techniques as interim orders, advance rulings, and consent decrees would add greatly to the speed and effectiveness of competition policy, to the benefit of both procedures and consumers.

By contrast to Canada, competition policies in Europe proceed by way of discretionary court law, while in the United States a combination of civil and criminal law is used. Such comparisons are not always meaningful, of course, given the differences in constitutional and economic history which are involved. However, it is worth noting briefly the United States practice which offers wider alternatives than in Canada. The United States government can proceed by criminal prosecution or civil action. The former can lead to punishment for past offences, and is used where the law is clear and there has been a flagrant offence and plain intent to restrain trade unreasonably. In order to remedy the situation, however, an additional civil action is also often used. In the civil case, a decree containing injunctions regulating future actions can be obtained, and it is for this reason that the United States Department of Justice frequently brings concurrent criminal and civil actions. For criminal actions it is possible for the court to impose fines or other punishment without a trial: in such cases a firm pleads *nolo contendere* and the court acts as if the case had been fought and lost by the defense. In a civil action it is also possible to modify or discontinue a particular action without a trial, if the court approves. In both these cases the firm and government must agree to the procedures.

The Government of Canada introduced a bill in 1971 to remedy a number of the specific problems noted earlier and to create a generally more effective competition policy.[2] Representations with regard to the bill are still being considered. The bill provided for the following, among other things:

(1) Outright prohibition of certain agreements under the criminal law, namely, agreements to fix prices, share markets, restrict production,

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[1] The Economic Council of Canada, on reviewing the question of industrial structure and competition policy, concluded that it was impossible to determine hard and fast answers. Where competition policy and efficiency turns on such questions as market size, the effects of scale and specialization, concentration of production, mergers, innovation, and tariffs, there is a need for a case-by-case approach so that economic analysis can be brought to bear on the specific circumstances involved. The Council recommended retaining certain broad prohibitions of price fixing and closely related practices, misleading advertising, and resale price maintenance. These would remain in large measure *per se* offences and also criminal. All other matters of relevance for competition policy, including mergers and a wide range of trade practices, would become the responsibility of a new tribunal, which would both conduct civil court proceedings of hearing, adjudication, and imposition of remedies, and conduct economic analysis. New procedures for permitting specialization and export agreements in certain circumstances would be set up. See *Interim Report on Competition Policy*, ch. 5 and 6.

[2] Bill C-256, given first reading June 29, 1971, subsequently withdrawn for further consultations with the public and the provinces. A new Bill C-227, to amend the *Combines Investigation Act* and the *Bank Act*, was given first reading on November 5, 1973. Its provisions were less comprehensive than the 1971 bill, but would make the *Combines Investigation Act* applicable to services, create some new remedies, and define some new trade offences.

boycott new entrants, wilful monopolization, resale price maintenance, misleading advertising, false representation, certain selling techniques, and undue limitations of opportunity to participate in professional and amateur sports activities. One modification being considered is to relate the prohibition in some of these to the effect the agreement has on the degree of competition.

(2) An expert tribunal to apply civil law provisions with regard to conduct which is not inherently objectionable but which may, in certain circumstances, inhibit competitive forces. This approach would also permit broader economic analysis to be considered more fully. Consideration is being given to further clairification of the role of a tribunal.

(3) Proposed mergers were to be registered and could be challenged if they materially lessened competition. Interlocking directorates might be challenged for the same reason.

(4) There were permitted exceptions to exclusionary agreements and restrictive practices under certain conditions, i.e., specialization or export agreements.

(5) Service industries were covered by the bill. They could be exempted from the bill where a province assumed the responsibility by legislation to regulate them in the public interest.

Long experience and considerable research have indicated that changes comparable to these are necessary if competition policy is to be effective. In an economy with many industries dominated by a few large firms and other industries dominated by local monopolies, the only other alternatives to protecting the public interest are more state regulation or outright state ownership. These alternatives, in some cases, are more cumbersome and more costly than an effective competition policy.

The departures from the present legislation in the proposed bill which are of most significance for the purposes of this paper were the inclusion of the service industries, formerly only partly covered, and the greater emphasis on civil procedures as evident in the role of the proposed tribunal.

There is no question of present federal authority in competition policy, even if the combine, merger, or restrictive practice is intraprovincial, so long as the criminal power is used. There is also likely to be no difficulty in using a federal civil power for purposes of enforcing competition policy as such in interprovincial and international trade. This would be based on the general power in section 91 and the trade and commerce power. This civil power may extend also to intraprovincial trade, provided the objective is the enhancement of competition as such rather than regulation of an industry. The precise limits of the federal government's civil law powers with respect to competition policy, and in particular just where competition policy ends and regulatory powers begin, is a question which has not been clearly defined by the courts.

It is recommended that competition policy should be explicitly extended to any service industries not now covered. In Bill C-256 it was clearly intended to place services on a par with goods with respect to competition policy. As indicated earlier, this is as desirable as for commodities and often more so, given the natural barriers to competition for many services. Because of their intangible nature, precise information on services is often less readily available to consumers. For the same reason, it is often not as easy to have arbitrage operations in which excessively high prices are corrected by mobility of standardized items. It is rather unclear why the present *Combines Act* and its predecessors are not more comprehensive on services. The Act of 1923 included most, if not all, services in defining a combine. The matter was not clarified in the courts since most subsequent prosecutions were based on the section of the *Criminal Code* prohibiting combinations. It has risen in subsequent revisions of the Act but has not been resolved. It might be noted that the Canadian position is quite different from that of other industrial countries. Competition policy in the United States, for example, includes all commercial activities, with exceptions limited to specific amendments to the legislation or arising from judicial interpretation. Of the other countries in the Organization for Economic Cooperation and Development, only Ireland limits the scope of anti-trust legislation to commodities.[1]

It might be asked whether services, many of which appear to be locally-oriented, could not be more effectively regulated by local competition policy. This is unlikely for several reasons. [2] Many services are not local at all but clearly interprovincial or international, as with a number of financial services. Many services which were local are becoming national and international in scope as a result of technical and other changes, such as the spreading franchise arrangements in the food and hotel accommodation industries. But, even where service industries remain local, the criterion to be applied is the same from locality to locality, i.e. to enhance competition. It is hard to conceive that differing provincial competition policies would be desirable. Such differences would clearly be untenable without a high degree of provincial regulation and protection, since stronger provincial anti-monopoly policies would tend to undercut weaker. Finally, as noted earlier, the enhancement of competition is closely allied to achieving the consumer and producer gains from the common market and it (or regulation where more effective) should be used where appropriate.

None of this implies, of course, that the provinces are unconcerned about competition policy. But, they do have other responsibilities which

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1 *Interim Report on Competition Policy*, p. 144.

2 In this respect we differ from the views of the Economic Council in *Interim Report on Competition Policy*, p. 108. The Council document gives no evidence of having considered the implications of provincial differences in competition policy, and may be rather too pessimistic on the constitutional question.

require regulation and which are sometimes in conflict with promoting competition, such as preventing overcrowding of an industry through licensing regulations, assuring skill standards, and so on. The problem is to reconcile the common interest in expanding the scope and effectiveness of competition policy while preserving the constitutional jurisdiction of the provinces for certain other regulatory purposes. There are ways to do this, such as the procedure in Bill C-256 which provided for the exemption from its provision for any specific behaviour of firms and associations of individuals where that behaviour was regulated or permitted by valid provincial legislation.

There is a major point regarding services which should be made here since it can affect any decision on the constitutional treatment of competition policy. The term "service" can be interpreted either as a category of output analogous to physical goods or as the intangible product of certain members of the labour force. Both these senses of the term are relevant to this paper, the former as defining a market area in the same sense as for goods, the latter with regard to the mobility of the supplier of the service. Labour mobility will be considered in a later part of this paper. If competition policy is to be limited by exempting significant service sectors from it, then some thought should be given to minimizing any resultant interference with interprovincial mobility of labour. In other words, the problems raised here extend to the question of the extent to which "services" are included in the regulation of trade and commerce and in section 121, and not just to competition policy as such.

An effective competition policy is necessary to realize gains from the common market. Such a policy should be within federal power and should extend to intraprovincial as well as interprovincial trade. It should be partly based on civil law if it is to avoid the Scylla of excessive reliance on criminal law, on the one hand, and the Charybdis of excessive reliance on direct regulation, on the other. And, competition policy should extend to services.

The clearest way to ensure that competition policy can be used effectively to realize the possible gains of economic integration is to give it a constitutional identity of its own. This could be done by adding a separate heading to section 91 of the *B.N.A. Act,* covering control of monopolies, mergers, combinations and restrictive trade practices. This should be done in terms which avoid restricting its scope by over-specification. At the same time, clearly identifying it as a competition power, it will not restrict provincial regulatory powers in other respects.

An alternative approach would be to clarify the present trade and commerce power to assure that (a) it covers competition policy explicitly, for both goods and services, (b) competition policy applies to intraprovincial, as well as interprovincial and international trade, and (c) it provides for a civil law basis in both cases. It may well be that court interpretations would

support most of this under the present constitution if it were tested more fully. But, it would be preferable to obtain explicit constitutional recognition of this by agreement with the provinces. Should an approach to the courts fail, the federal government would have to continue to rely on its criminal power to reach intraprovincial trade — which would involve procedures which are too lengthy and blunt — or would have to resign itself to ineffectiveness in parts of this important policy field. Given the importance of the field and the problems of covering it through criminal law, the likely outcome of this weakness would be more direct governmental regulation of industry than may be desirable.

Patents, registered industrial design, trademarks and copyrights

Regulation of these is presently within exclusive federal constitutional powers (91 [22] and [23]). [1] Policy on these "intellectual and industrial property rights" is a compromise between two conflicting needs. On the one hand, the benefits from such innovations ought to be diffused as widely and as rapidly as possible throughout society if they are to have their maximum effects on cultural and economic development. They should be imitated quickly and at the lowest possible prices to achieve this effect. On the other hand, it is generally assumed that, without some capacity to capture some of the economic returns involved, investment in such knowledge or creative activity might be less. The solution to this dilemma is a temporary legal monopoly for the innovator or creator.

The concern here is not with the virtues of this system or the complexities involved in any reform of it, [2] but rather with the question of its proper place in the constitution. There are at least three reasons for continuing with the present exclusive federal jurisdiction.

First, if provincial differences existed in these areas, they would be equivalent to protective barriers which limit the flow of goods and ideas within Canada. In practice, these differences would disrupt the common market. A patent, for example, may confer an exclusive right to produce or distribute a product within a given geographical area and hence would involve the limitation of imports of that product into that area. If one province could establish a patent system which differed from that of another, this would either limit the flow of otherwise identical products or perhaps encourage evasion.

Second, as already noted, these devices are temporary legal monopolies designed to give incentives to the production of new products and processes.

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1 Trademarks are covered by 91 [2] as noted earlier.

2 These are discussed at length in Economic Council of Canada, *Report on Intellectual and Industrial Property* (Ottawa, Information Canada, 1971).

It is important, accordingly, that their development should be closely co-ordinated with competition policy in order to minimize conflict. It is well recognized that these legal monopolies are capable of restricting trade in ways ordinarily prohibited by anti-combines policies. [1]

Finally, laws on these property rights are closely linked with those of other lands via international treaties and conventions. Much of the study on these matters is concerned with the nature of these links, including particular policies that are of greatest potential benefit to Canada. Most countries use a greater percentage of the total international supply of such information than they can generate. Canada is one of the larger net importers of such property rights measured by net payments abroad, and in other ways. It is a matter of national importance that policies in this area result in a balance to the advantage of Canada during any given period.

Apart from links through treaties or conventions, directly bearing on these rights, their exercise is closely related to international trade. Patents which give Canadian residents exclusive rights to produce and market products may inhibit imports to Canada, just as such exclusive rights granted to residents of other countries can inhibit exports from Canada. If they do not actually result in such protection, they may increase the prices of the traded goods. The impact of these rights is very much like an invisible trade barrier, a matter which is beginning to engage the attentions of international organizations. The Canadian government must be in a position to negotiate effectively in this field in the national trading interest. As noted earlier, in the case of visible barriers to foreign trade, effective negotiating power presupposes an internal market free of such barriers and a uniform policy externally.[2]

There are gains to be made for economic and cultural development from the widest possible access to innovation and information and to the widest possible market for creative activity which results from the exercise of these property rights. Given their close connection with the mobility of goods and services within Canada, with international treaties and conventions, and with competition policy, it is suggested that the power to regulate in these areas should remain exclusively federal.

3. *A Further Comment on Non-Tariff Barriers*[3]

It was emphasized in several of the above sections that the mere prohibition of a tax on trade, or some other explicit barrier such as a quota,

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1 Under section 30 of the *Combines Investigation Act* the Attorney General of Canada can intervene to protect the public interest against restrictive devices which extend beyond the scope of the *Patent Act.*

2 See section 5, Part II.

3 For a more extensive discussion of this subject see Albert Breton, *Discriminatory Government Policies in Federal Countries,* and Klaus Stegemann, *Canadian Non-Tariff Barriers to Trade* (Montreal, Private Planning Association of Canada, 1967 and 1973 respectively).

can be fully circumvented by a wide variety of regulations affecting an industry. In section 121 of the *B.N.A. Act,* the emphasis is on customs duties rather than on the more general idea of unrestricted movement. It is true that the trade and commerce power generally prohibits regulation of interprovincial trade by a province. However, as noted in a previous section on agricultural marketing, there are, in practice, a great many devices that are often hard to identify which can be used to restrict the mobility of goods.

These so-called "hidden tariffs" raise the issue of harmonization for a wide variety of policies, with regard to both international and interprovincial trade. A few examples are in order.

(*a*) Individual provincial liquor boards are empowered to determine the type of liquor which can be sold in the province and the markup on particular liquors. These markups are differentiated even for competing liquors; for example, in at least one province the markup on scotch whiskey has been higher than for Canadian whiskey. In effect, the provinces can control both the types of liquor, Canadian and imported, that can be sold and their relative prices.

Such provincial actions clearly detract from the authority of the federal government to regulate imports through tariffs or to negotiate access for Canadian products to foreign markets. If some of Canada's trading partners were interested in improved access to the Canadian market for their liquor in return for which they would grant improved access to their markets for Canadian products, the Government of Canada would not be in a position to offer credible concessions. Reduced tariffs, for example, could be nullified by provincial action on markups. Indeed, the markups by provincial liquor boards have been notified by foreign governments to the General Agreement on Tariffs and Trade as a non-tariff barrier.

It should be added that this situation arises, in part, because of federal legislation. As noted earlier in discussing the Gold Seal Case, Parliament used its general power to reinforce provincial liquor prohibition laws by blocking the movement of goods from one province to another.

(*b*) A second example is in the field of product standards.[1] The general importance of standards can hardly be overemphasized. Their control offers convenience, safety and savings for both producer and consumer, yet they are all too often taken for granted. Provincial railway gauges no longer exist in Canada but in Australia travel by train from one state to another often involves changing cars at state boundaries because railway gauges are not standardized.

Responsibility for establishing mandatory standards in Canada is

[1] For a fuller discussion see the report prepared for the Economic Council of Canada and the Science Council of Canada by Robert F. Leggett, *Standards in Canada* (Ottawa, Information Canada, 1971).

shared by the federal, provincial and municipal governments. The federal government has the prime responsibility for the maintenance of regulations with regard to food and pharmaceutical standards, weights and measures, and hazardous products. Provincial governments have been responsible *inter alia* for developing safety standards for electrical equipment, gas and oil heating equipment, and elevators. Municipalities develop their own standards, such as building codes.

There are some cases where differing standards cause an impediment to interprovincial trade. For example, provinces have differing requirements concerning the colouring of margarine. Ontario is the only province that does not allow the sale of honey in 24 ounce containers, a size authorized by federal honey regulations. It is evident that, with the increasing number of diverse standards and regulations being implemented by the provinces, significant barriers to the free movement of goods among provinces can be created.

Differing national standards are also a constraint on international trade. The harmonization of standards is an objective being pursued by a number of international organizations. Moreover, in the General Agreement on Tariffs and Trade, as part of a broad exercise to reduce non-tariff barriers to trade, governments are working on the establishment of an international code on standards aimed at removing their trade restricting features. In this regard, provincial responsibility for some standards has a limiting effect on Canada's capacity to negotiate agreements and to adhere to international codes on standards which would advance Canadian trading and industrial objectives. Closer consultation between governments is going to be necessary to overcome this difficulty.

(*c*) The attempts by governments to encourage regional development have led to a host of preferences being given to firms that locate within certain regions. One aspect of this, encouraged by all levels of government in Canada and by foreign governments, is the use of specified preferences for local suppliers in the case of government purchases. Governments clearly have the power to purchase as they wish and the developmental objective is clearly one of high priority. It is also true that such preferences are tantamount to a tariff on interprovincial or international trade. Therefore, they raise issues similar to those noted elsewhere in this paper.

It is not difficult to extend this list, or to demonstrate further the ways in which such non-tariff barriers restrict not only interprovincial trade but also imports and the ability of the federal government to negotiate more favourable access to foreign markets for our exports. As has been repeatedly emphasized above, regulatory powers (and, indeed, tax and spending powers) must have some minimal degree of harmonization if the gains from the common market and economic union are to be realized. However, as

with other objectives, the unrestricted movement of goods and the resulting efficiency gains cannot be unqualified.

Completely unrestricted trade would require a degree of standardization of taxation, spending and regulatory policies which would severely curtail provincial, and perhaps federal, fiscal powers and limit the achievement of other important policy objectives, while often contributing only modestly or indirectly to mobility. Moreover, enough has been said with regard to the three very different examples noted above, to suggest that the degree of harmonization necessary to preserve the internal common market and common external policy cannot be put in general terms but must be related to the circumstances of each case.

This conclusion is not meant to underestimate the importance of some of these policies to the operation of the common market. Nevertheless, from the viewpoint of constitutional review, the harmonization of policy may be *economically desirable* for many of these areas in the sense that it will contribute to the efficiency of the federal common market although not logically or economically necessary to it. Only case by case study will reveal how far one should go by way of consultation, legislation, appeal to the courts, or constitutional revision to achieve the required degree of harmonization.

This conclusion would be stronger if either section 121 or 91 [2] or perhaps both were to be strengthened for reasons discussed earlier in this paper. They would then also help to restrain with more certainty those non-tariff barriers which significantly affect interprovincial or international trade. This might be done by rewording section 121 to bring it closer to the concept of unrestricted movements of goods, either by introducing a more general term for the present "free", or by spelling out that term to cover duties, quotas and their equivalents in terms of other devices. Against this one must take account of the fact that section 91 [2] already includes a significant federal power to prevent regulation of interprovincial and international trade, as the section on the constitutional background indicated. Whether that power is strong enough to balance the equally necessary regulatory powers so as to give effective scope to the common market principle is a central issue of this study. The important point here is that any rewording of this or other sections of the *B.N.A. Act* should take account of this set of issues. It is, perhaps, appropriate to note that the reduction of such non-tariff barriers is becoming of increasing concern internationally. Consequently there is a much greater need than before to co-ordinate federal and provincial policies in these areas. Both provincial and federal interests would be badly served if the development of enlarged markets for processed and manufactured goods in particular was frustrated by the inability to offer credible concessions to other countries or by the fragmentation of the internal market through such barriers.

In concluding Part III, it may be noted that most of the analysis to this

point has concentrated on commodities and the economic union. The growing importance of services in the Canadian economy is well recognized. Their apparent neglect is not deliberate but results from the focus and organization of this paper. The term "services" covers a great variety of activities, some of which are supplied in a labour-intensive way and some in a highly capital-intensive way. Many are highly localized, while others are provided internationally.

It was suggested earlier that the term "services" can be thought of in two senses, either as an intangible product of an industry or as the contribution of labour to production. In the first sense, a number of service industries are specifically mentioned in the division of powers, for example, banking and transportation. In this paper the industry approach to services is considered only in the contest of competition policy. Some aspects of labour services relevant to the paper, particularly labour mobility, are considered in the next section.

Here it is worth repeating that the guarantee of the customs union provided by section 121 does not extend explicitly to services. This might not seem a problem at first sight given that many services are non-transportable, hence often confined to regional or local markets. In fact, of course, the service-providers are mobile. Moreover, some critical services not mentioned explicitly in the *B.N.A. Act,* such as insurance, are organized and supplied on a national or international basis. Section 121 does not explicitly extend to persons. Some of the consequences of this are important and will be considered below. Moreover, as noted in the review of the constitutional background, it is still not settled whether section 91 [2] extends to non-commodities and, if it does, whether it applies in the same senses as to commodities. Both these points will be discussed further in the concluding part of this paper.

Part IV

Some Aspects of the Mobility of Labour

At various points in this study passing references have been made to the relation between the mobility of labour and the federal economic union. This section explores some aspects of this question as they relate to the topic of the present paper. It bears emphasis that this is not intended as a study of the constitutional jurisdiction over labour legislation as such, or of income security and social services. Moreover, even within the relevant framework of the common market in labour, this section is more clearly intended as a *tentative* exploration of certain issues than is the case for other parts of the present study. If the issues are considered worth pursuing in the context of constitutional review, more detailed further study may be desirable.

The provinces now have the major jurisdiction with regard to labour legislation.[1] Their authority flows mainly from section 92, which gives the provinces exclusive power to make laws regarding "property and civil rights in the province". The right to contract is a civil right, and labour laws, which impose conditions on the rights of the employer and employee to enter into a contract of employment, are laws in relation to civil rights. The provinces also have exclusive legislative jurisdiction over "local works and undertakings". In addition, because of their powers over licensing, the provinces enact legislation governing the operations of the professions.

The federal government has power to legislate on labour matters because of its exclusive jurisdiction over certain subjects enumerated in section 91 or excepted from provincial jurisdiction in section 92 [10]. These undertakings are mostly of a national, interprovincial or international nature. These include operations that connect a province with another province or country, such as railways and telegraphs; activities assigned exclusively to Parliament, such as banks; and works situated within a province but which

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1 This statement on labour legislation is taken from Canada Department of Labour, *Labour Standards in Canada*, December 1969, (Ottawa, Information Canada, 1970).

have been declared by Parliament to be for the "general advantage" of Canada or of two or more provinces, such as grain elevators, feed mills, and uranium mines. Parliament also has legislative authority with respect to those parts of Canada which are not included within a province.

1. *Labour Mobility and Economic Integration*

The relationship of labour mobility to the present paper can be seen by reference to the earlier discussion on the effects of economic integration. It was noted that (with some qualifications) economic benefits would accrue to member provinces from free interprovincial trade, given both the resultant opportunities to specialize production and to achieve various economies, as well as the opportunities to purchase the produce of other provinces. Such an arrangement is a *customs union,* that is, free movement for commodities only. From the viewpoint of the entire federation, additional gains are forthcoming from a *common market,* that is from the absence of provincial barriers to the mobility of labour and of capital. [1] This can be seen most simply in terms of the employment of unused resources, when labour which is idle in one province or region takes employment in another province or region. There are gains to a common market, moreover, even if all those who are seeking work in a province can find it there. Optimum growth requires that labour and capital be able to move to their most productive uses in the sense of contributing most to the expansion of national product. These production gains are accompanied by consumption gains over and beyond those available simply by buying commodities from other regions. For individuals, as was noted earlier, have different preferences for various kinds of public goods and the tax systems which accompany them. Unless these are identical in all provinces, labour mobility permits the exercise of some degree of choice among these systems if employment and income opportunities are such that a choice is actually feasible.

As before, this reasoning must be qualified. The mobility of labour will be hampered, and even be contrary to individual and national improvement, if unaccompanied by labour retraining and adequate social capital in the new setting. Moreover, any social costs attendant to the resulting increase in national income must be taken into account. It is also important to add that, while reduced unemployment and higher productivity may enlarge national output with given resources, they will not necessarily enlarge the total and per capita output of every province or region. A province which experiences

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[1] One might ask whether, in the absence of mobility of labour and capital, commodity movements alone might bring these gains to the regions involved. Free trade in commodities does tend to reduce differences in the rewards to similar types of labour and capital between the trading regions. Thus, the demand for an unutilized or underutilized agent of production in a region can be increased by trade with other regions. This process stops far short of complete equalization of such rewards under realistic assumptions. There remains scope, in brief, for further economic gains to the federation from the mobility of labour and capital, as well as of commodities.

a net loss of the agents of production may well view their mobility as undesirable. Loss of skilled and/or younger persons may permanently affect its potential for growth and development, as will large capital exports. In a direct sense, it matters little to the province losing labour and capital that national efficiency and national product are increased if, at the same time, it suffers a decrease in economic welfare. Put differently, federalism cannot have an objective of simply the maximization of overall efficiency or growth without regard to the impact on regional development.

The emphasis above has been on the gains in terms of production and consumption which arise from the freedom of labour to move between provinces. In a federation there is a more fundamental reason for guaranteeing such a freedom, and that is the individual's right to move freely anywhere in the country in which he resides. This right, which extends to emigration, is a hallmark of democratic systems. Conversely, in authoritarian regimes the right to move within the country and to emigrate is generally circumscribed. While Canadians would not question this right to physical mobility, in practice there are important complications. Simply being free to move from one province to another would mean little if one could not practice one's trade in the other province or have easy access to public services therein. Yet if one were to put all of the emphasis on the need to encourage mobility in this fuller sense, or at least not to restrict it, there would be a serious limitation of the major jurisdiction which the provinces have in labour legislation, their power to license, and the jurisdiction they now possess in areas of income security and social services. As with commodities, there is a need to reconcile mobility and efficiency gains with regulatory and spending powers used for other purposes.

The importance of labour mobility can be considered from another viewpoint. In Part I of this paper a distinction was drawn among those economic functions where co-ordination is logically necessary to a common market and economic union, those where it is economically necessary, and those where it is economically desirable. It was concluded earlier that free movement of goods internally and a common commercial policy externally were logically necessary to a common market and economic union, as well as being supported by the second set of reasons on economic necessity. For identical reasons, this is also the case for labour mobility within Canada, as well as for a common set of monetary institutions which are not discussed in this paper. This is so both conceptually as one of the defining characteristics of the federal system in its economic aspects, and in terms of the national gains from economic integration. Since mobility of labour and capital, as well as goods, are the defining characteristics of the common market-economic union goal of our federation, consideration should be given to constitutional guarantees and to regulatory powers with regard to these particular characteristics.

But,we can go one step farther. It was concluded earlier that internal mobility of goods logically requires a common external commercial policy, since varying external barriers to goods by provinces would soon vitiate the common internal market and the ability to negotiate Canada-wide trade concessions with other governments. For similar reasons, immigration policy also requires co-ordination if internal mobility of labour is to be meaningful. Differentiated provincial policies on foreign immigration would be quite ineffective in the face of free movement of labour within Canada. The only way in which different provincial policies on foreign immigration could be made effective is to restrict labour mobility within Canada. This is one major reason why immigration policy should remain a concurrent power, with federal paramountcy. Other major reasons are that national stabilization and growth policies would be ineffective without control of the influx of foreign labour, and that immigration policy is an important aspect of foreign policy. Similar reasoning would also apply to some aspects of foreign investment policy.

This is not to deny the considerable interest which provinces have in the impact of federal policies determining immigration and international capital flows as they relate to economic and other provincial policies. Whatever methods are worked out to give effect to these provincial interests, one should not lose sight of the common market and economic union objectives of the federation. These involve the overriding national need to preserve internal mobility of goods and agents of production and a common external policy with regard to them.

As noted earlier, the constitutional guarantee of a common market is incomplete if one refers to the *British North America Acts*. The explicit guarantee in section 121 is to a customs union, i.e. to commodities. Neither labour nor capital are explicitly covered here or elsewhere. In fact, of course, internal free movement in the sense of the absence of explicit barriers to labour mobility prevails in practice to a large degree. Perhaps such movement is also capable of defense, where necessary, through judicial interpretation of the federal power over trade and commerce, although that is not clear. It will be noted shortly in any case that, as with commodities, there are some difficult reconciliations to be made between this power and provincial regulatory powers.

In earlier sections it was noted that the courts of other federal countries have interpreted the commerce power widely to encompass persons. In Australia, "trade" refers to the field of activity, and not just to goods — it covers intangibles, goods, persons, and capital. In India, "trade, commerce and intercourse" has also been interpreted widely to cover persons, following the United States and Australian approaches. In addition, the Indian Constitution assures citizens the right to exercise their professions or trades.

In order to clarify the questions involved, two issues vital to the welfare

of Canadians have been chosen for exploration. One is the question of restriction of entry to occupations, the other that of access to public services.

2. *Occupational Restrictions and Interprovincial Mobility: The Professions and Skilled Trades*

There are many types of labour standards for the protection of producers or consumers which might have the incidental effect of restricting labour mobility. The one which is most likely to have a major effect is the existence of restrictions of entry into occupations, when those restrictions are applied on an interprovincial basis. Consideration of a special aspect of these, when they are directed at immigrants from abroad, is deferred until the next section.

Most of the professions are regulated by a "college" or association of that profession's membership. The college or association is responsible for administering an act of the provincial legislature and, in so doing, usually establishes a register, establishes conditions of licensing and also enacts various by-laws regarding such matters as discipline and fees. The colleges frequently establish a list of accredited educational institutions in the province, and often outside it. They are also responsible for assessing applicants from abroad and from other provinces. It may be noted that some professions require a license to practice while others require that practitioners be certified rather than licensed. Physicians are an example of the first type, health technologists in Ontario of the second. Licensing constitutes the conferring on a group of the exclusive state-granted right to practice, while certification is simply a state endorsation of competence.

Some of the consequences of this system of regulation have led to public concern and to suggestions for reform, ranging from the divorce of licensing procedure from fee-setting and the introduction of lay members to governing councils to the application of combines legislation to the professions. The concern in this paper is specific barriers to interprovincial mobility by way of barriers to entry into the professions. The most obvious potential barriers are the licensing requirements. These are granted by provincial authorities, usually through the professional body, and often vary widely by province. One example of the barriers to mobility which can result is that of the pharmacy profession in Ontario. The following quotation from the report of the Ontario Committee on the Healing Arts is germane:

> "One of the most striking features of the profession to come to the attention of the Committee was the relatively small number of pharmacists in Ontario who were trained outside Ontario. Indeed, until the regulations were recently amended after the Committee, at its hearing with the Ontario College of Pharmacy, questioned its defensibility, section 11 of the regulations provided that applicants for

> registration in Ontario who were qualified to practise pharmacy in a jurisdiction other than Ontario should not be registered in excess of one per cent of the registered pharmaceutical chemists in Ontario in the same year. Still unchanged, however, is the impediment to migration to Ontario of qualified practitioners from elsewhere, even from the other provinces, that is found in the requirement, which, in our view, cannot be defended, that an out-of-province applicant for registration must have resided in Ontario during the six months preceding the application." [1]

Less extreme examples with similar effects on mobility are not difficult to find. The medical profession in Ontario, for example, is more liberal than this. Yet an established doctor from another province who wishes to move to Ontario could run into difficulties in that he would have to meet the same requirements as an Ontario medical student. The most obvious case would be a British immigrant doctor who had practised in one of the provinces that has a reciprocal arrangement with the U.K. General Medical Council. Ontario does not have such an arrangement.[2] In varying degrees, lawyers, dentists and many other professionals are unable to practice in one or more other provinces without payment of special fees, examinations, or satisfying other regulations which result from variations in standards or from outright protectionism by the colleges. The lack of a nationally recognized standard impedes mobility whenever the direction of labour flow is from a jurisdiction with fewer or less demanding requirements to one in which licensing requirements are more prevalent or more demanding. The principle is easily extended to foreign-trained personnel since the arguments for fostering mobility based upon recognition of qualifications obtained abroad are similar to those aimed at obtaining nationally recognized standards.

In certain circumstances, however, a professional may obtain employment without the licencing requirement. A doctor trained outside Canada may be employed in a hospital under supervision, or as an assistant. Similarly, a pharmacist may work in a hospital without obtaining a licence. In any case, the professional trained elsewhere, but without a provincial licence, cannot work independently. In short, whether the system of regulation is by licencing or certification, the barriers to mobility stem from the lack of uniformity and the lack of reciprocity arrangements which, in turn, stem from the various enactments of the self-governing professions. Uniformity, in the sense of provincially comparable licensing requirements,

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1 Province of Ontario, *Report of the Committee on the Healing Arts* (Toronto, Queen's Printer, 1970), volume 3, pp. 59-60.

2 In particular, he would need to secure by examination the Licentiate of the Medical Council of Canada if he did not already possess it. See J.W. Grove, *Organized Medicine in Ontario* (Toronto, Queen's Printer, 1969) pp. 114-115 and chapter 8, a study prepared for the Ontario Committee on the Healing Arts. It should be noted that the Licentiate is not a license to practice medicine but simply allows the holder to register with a provincial licensing authority without taking a provincial licensing examination. It has the effect of serving as a national standard, except that all provinces do not require licensees to possess it.

would be insufficient to promote national labour mobility without provincial reciprocity. That is to say that without acknowledgement of skills gained elsewhere in Canada, full mobility is impossible. [1]

Some similar problems exist as regards the interprovincial mobility of skilled tradesmen and craftsmen. Since the provinces have the major jurisdiction in labour standards, one should not be surprised to find some significant variation by province in such matters as minimum wages, workmen's compensation, vacation regulations, and other labour standards. [2] Of more direct interest to labour mobility, provincial variations exist as to the certification and licencing requirements of the various trades and crafts. It is true that certification is often voluntary, hence the barriers to mobility are much less. Where this is not so, the same issues of non-uniformity and lack of reciprocal arrangements exist. These differences, which may reflect a variety of other objectives, also tend to impede labour mobility in the same way as in the professions. A motor mechanic from Ontario, for example, may move to Manitoba without difficulty, since Manitoba has no licencing requirement. However, the converse is not possible since Ontario motor mechanics must be licenced. Even where uniformity in requirements exists, the lack of reciprocal arrangements in recognizing training obtained elsewhere impedes mobility, either by delays in recognition or by re-qualification provisions. For example, a craftsman trained in another province must often return to school and re-qualify in his trade to obtain recognition in Ontario. An established craftsman might well hesitate to pay such a price for moving elsewhere.

Considerable progress is being made in fostering national uniformity. The Interprovincial Standards Program (Interprovincial Seal Program) attempts to establish national trade standards to enable workers to move to other provinces without re-examination in their trades. When a tradesman achieves the level of the nationally-agreed standard an interprovincial seal is affixed to his certificate, thus enabling him to work in another province without re-qualification. To obtain the seal, a candidate must either be a graduate of a provincial apprentice training program or must meet requirements for provincial certification in that trade. In 1973 there were

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1 It is worth noting here some of the recommendations of the Ontario Committee on the Healing Arts, which point to increased internal mobility for professional persons. For example, the report recommended with respect to physicians: "That every possible encouragement and assistance be given by the Government of Ontario to the Federation of Licensing Bodies of Canada to develop national standards for licensing physicians and to facilitate mobility of medical personnel between provinces" and to "establish with the Federal Manpower Department a Canada-wide system to provide objective evaluation of foreign medical schools" (Report of the Committee, vol. II, p. 89). Similarly, the Report recommended for Ontario dentists joint examinations with the National Dental Examining Board, the examination of the National Board being required if the person contemplates practicing elsewhere in Canada (vol. II, p. 141). With respect to the nursing profession, the report urged the development of international agreement on qualifications in order to facilitate international mobility of nurses (vol. II, p. 204). In Ontario, the report recommended the abolition of the residency requirement for pharmacists trained outside the province. (vol. II, p. 234).

2 For details, see Government of Canada, *Labour Standards in Canada, op. cit.*

seventeen trades in which there were interprovincial agreements on qualifications. The majority of those workers who require provincial certification are now covered by these agreements.

There are two other aspects of the mobility of tradesmen which deserve comment, but the lack of detailed studies permits only a brief and highly tentative statement. First, compared with the professions, apprenticeship training generally appears to offer far less significant barriers to entry of the kind which impede interprovincial mobility. The period of formal schooling for most trades is relatively short compared to the educational requirements for professionals. Often the formal apprentice training is a matter of weeks. Moreover, the more important training is actual work experience. There is some provincial cooperation on this; for example, Saskatchewan and Alberta co-operate in recognizing credit for work experience. In Ontario many trades usually require no more than affidavits from former employers stating that the apprentice has been employed in the trade for a stated period of time.

A brief and tentative note may be added about trade unions. Most locals are organized on an area basis and are concerned, therefore, with a geographical domain much smaller than a province. In Quebec, for example, a construction union card "ties" the worker to a specific area. Should a worker wish to move to another area, within or outside the Province, the local to which he desires to move must first accept his transfer. Often he will have to possess the necessary trade qualifications, such as the provincial licence or interprovincial seal, but his acceptance in the other local will depend largely on the availability of jobs. If he is not accepted, he can seek work in a plant through an industrial union or he can work on his own — with certification where necessary. This may involve costs to the excluded worker, of course, since wages may be less in the positions involved. As far as skilled workers are concerned, the system of union locals, however, tends in the main to protect *local* area trades. Barriers to *interprovincial* mobility are more likely to be posed by provincial qualification requirements than by union restrictions.

3. *Occupational Restrictions and Interprovincial Mobility: The Immigrant from Abroad.*

The federal government presently determines overall immigration policy by an explicit point system, and the distinctions thereby established may be regarded as an exercise of national sovereignty with respect to the common external barrier. So far as it is not the intention to restrict the newly-landed immigrant in his range of employment opportunities and choice of locations, the immigrant, as a member of the labour force, must be considered equivalent to the established member of the labour force. In other words he should be considered a member of the *national* labour force,

and, accordingly, potentially mobile to all parts of Canada. He is not, in effect, simply a member of a smaller provincial labour market. Thus the exercise of any provincial sovereignty which effectively leads to additional barriers to mobility for the immigrant is contrary in spirit to the common market aim of mobility under the above assumption, viz. non-discrimination with regard to landed immigrants. So long as provincial efforts to promote immigration serve largely to provide a queue of potential recruits for the federal immigration authorities, but do not restrict movement of immigrants within Canada, there is no conflict with the concept outlined here.

Present Canadian immigration policy concerning admittance is based upon a system of points ("assessment units") so that a prospective unsponsored immigrant must obtain at least 50 points. The emphasis on occupation and employment in the assessment scheme is illustrated by the fact that 60 points out of a possible 100 are related to educational qualifications or occupational demands and skills. According to 1969 data, about half of the immigrants became job seekers and 53 per cent of these entered or sought employment in managerial, professional, technical and clerical fields.

The emphasis of federal immigration policy on skills and the number of immigrants entering professional, unionized, or skilled and semi-skilled occupations means there is considerable overlap with the issues discussed in the previous section. The problem arises for the same reasons noted earlier. That is, provincial standards are not uniform and they are not reciprocally acknowledged. The consequence in terms of the common market for labour is an inconsistent, inefficient, and often inhumane application of the "common external barrier" to the inflow of manpower from abroad.

A sample study of immigrants in 1969 is suggestive. [1] Of the 4,106 usable responses, 42% indicated that, six months after arrival, they were not in their intended occupation. Further study of the latter group indicated that the reasons for not being in the intended occupation were given by the respondents as follows: not enough Canadian experience, 20.3%; did not meet language requirements, 19.3%; no job available, 18.9%; qualifications not recognized by professional or trade organizations, 11.4%; chose different occupation, 11.0%; qualifications not accepted by employers, 5.9%; other reasons, 13.2%. But a much higher percentage of professional and technical immigrants, 21.0%, listed the non-recognition of qualifications than did any other significant group of immigrants. There may also be some overlap among the reasons given for not being in an intended occupation.

It is not difficult to find examples of requirements for entry into a profession which seriously and unevenly limit mobility of immigrants. A

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[1] Department of Manpower and Immigration, Ottawa. Unpublished Report.

recent study indicated that immigration played a very minor role in the supply of dentists from 1946 to 1960, in contrast to a number of other professions. The situation existing in Ontario until recently has been put as follows: [1]

> "Recently more dentists from abroad appear to have been interested in migrating to Canada. Although the policy of the Royal College of Dental Surgeons of Ontario has been altered, and may be changing further as this report is written, many dentists seeking a licence to practise here have faced formidable obstacles. In the past they were required to be Canadian citizens or to convince the Board of their intention to become such; to have had pre-dental educational qualifications 'equivalent to those required of Ontario students'; and to present evidence of having had two years of approved pre-dental education and a four-year dental course. If their dental course had been at a dental school in the United States, the United Kingdom, Eire, Australia, New Zealand or South Africa, they were eligible to sit for Board examinations. The latter, which were mainly 'clinical' were available to the student only if he could pay a $100 examination fee, and furnish his own patients, instruments, and materials. Graduates from dental schools in countries other than those mentioned were not eligible to sit for the Board's examinations until they had successfully completed two or more years of dental education at a faculty of dentistry in Ontario."

Many other examples, usually less stringent, are available.[2] Only six provinces have reciprocity with the United Kingdom's General Medical Council, for example. In Ontario, which does not have reciprocity, graduates of medical schools in the United Kingdom and in a few other countries are accorded the same status as graduates from Canadian medical schools. Since this means they must possess the Licentiate of the Medical Council of Canada, however, they are placed on a special register until then — that is, they can legally practice only in a hospital or as an assistant to, and under the supervision of, a fully licensed practitioner. While other factors would affect this outcome, it is of interest to note that a study for the early years of the sixties indicated that Ontario registered far fewer foreign graduates, as a proportion of all new registrants, than any other province except Quebec, a province where considerations of language and, perhaps, other factors could make such a comparison inappropriate.[3]

The implications of differences in provincial standards and/or lack of reciprocity are twofold in the present context. Firstly, if certain provinces do not acknowledge foreign qualifications in the trades or professions then the immigrant's mobility is limited to those provinces in which his qualifications

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1 *Report of the Committee on the Healing Arts*, vol. 2, p. 142.

2 The following paragraph is based on Grove, *op. cit.*, ch. 8. It is well to add that the recognition given in Ontario to graduates of medical schools in other countries is generally less than that noted here.

3 *Ibid*, p. 126.

are recognized, assuming he wishes to practice his trade or profession without losing time or money. The immigrant, therefore, like the Canadian certified in one province and seeking employment elsewhere, *is part of a provincial labour market* rather than a national market. The prospective immigrant immigrates, in effect, to a province and not to a country.

Secondly, associations which are created by the provinces can use the differences in training here and abroad to block the foreign-trained professional or tradesman from practice by using various delaying measures and by imposing additional licensing requirements. Sometimes these differences in training are real and there is an important question of the appropriate standards. Too often, however, the requirements are partly or wholly irrelevant to determining the immigrant's professional competence. Residency, citizenship, and other requirements are imposed which the immigrant finds difficult to meet. The case of pharmacy in Ontario was noted earlier. The Quebec College of Pharmacy admits only students who attend the two provincial pharmacy faculties, which in turn admit only Canadian citizens. This means that a pharmacist who was qualified abroad must wait up to five years for his citizenship papers, then repeat his studies for another five years, just to qualify for the college examinations. A study in 1969, before the province of Quebec began to consider action on these restrictions, showed that there were 20 professional and trade societies in that Province which required citizenship as a condition of admission, usually along with a number of other restrictions. [1]

Similar types of problems arise for some of those in the skilled trades although, perhaps, with less severity for reasons given earlier. The fact that the Interprovincial Seal Program does not now extend to uniform recognition of foreign qualifications merely underlines this problem. The outcome is similar, namely, the "common external barrier" is far from uniform by provinces. Thus the skilled immigrant may find himself immigrating to a province rather than to a country insofar as the practice of his trade is concerned, assuming that citizenship and other requirements do not entirely bar him from working at his trade or profession for some years after moving to Canada.

4. *Some Possible Approaches.*

The range of issues noted here will grow in importance with the increasing skills of the Canadian labour force. In addition, should one or more provinces systematically increase their regulation and planning of manpower, including the setting of uniform skill requirements for each trade, there is increased possibility of conflict for workers moving to or from other provinces which do not have such requirements, or have different ones. In

[1] The case of pharmacy in Quebec and the study noted are reported in the Globe Magazine, February 7, 1970.

the pursuit of provincial development policies, moreover, there is the understandable temptation to discriminate in favour of employment of the province's labour force, since this is the constituency of the provincial government. [1]

These barriers to the mobility of labour arise, as noted, *(a)* because there is provincial control of much of labour legislation and of licensing, and *(b)* because certification and licensing are not uniform and/or not reciprocal within Canada or with respect to immigrants. It bears repeating that the regulations involved are there for a variety of purposes, some of which might be considered justifiable from a public policy perspective while others might not. Many are intended to ensure an appropriate level of qualification in order to protect the public in purchasing intangible and variable services. Others, even with the most charitable interpretation, appear largely to protect the interests of existing provincial producers rather than consumers, and to take even less account of the interests of producers in other provinces, or landed immigrants.

The concern here is the responsibility for policy, particularly with respect to removing barriers to labour mobility. Clearly, the provinces, in the exercise of their constitutional jurisdiction over much of labour and licensing, can do a great deal in the matter of improved policy. There is now considerable activity in this respect. Thus there is legislation, or proposed legislation, involving such matters as laymen on the governing councils of the professional groups and more precise definition of the latters' powers and responsibilities. There are also greater efforts to develop and accept nationally-recognized standards both internally, such as the Interprovincial Seal Program, and with respect to immigrants such as the case of the medical profession. It is no reflection on these efforts to note that they have been slow in developing in spite of extreme hardship to many actual, or potential, Canadians. They also involve considerable negotiation and careful planning on many issues not directly related to mobility if they are to protect the interests of both the producers and consumers of complex services. Moreover, they achieve, at best, only partial success if one or more provinces decides to stay out of a particular attempt at agreement or to go its own way with regard to standards. This diversity may be appropriate in terms of the distinctions which provinces may wish to maintain and in terms of the regulatory powers they have in these areas. It can, however, leave a serious problem in terms of the mobility of skilled labour.

A stronger federal presence in this area would greatly help, both to achieve the required uniformity where the matter is of importance to all Canadians, and to minimize the problems for mobility where agreed

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[1] There is some evidence that direct inducements have been included for hiring provincial rather than extra-provincial workers in a number of major development projects negotiated by some provinces.

differences by regions are preferred for other reasons. It has already been argued above that the absence of explicit barriers to internal labour mobility and a common set of immigration requirements are in the former category. Both levels of government have a stake in this in terms of economic gains and in the more basic terms of human rights. Given its larger constituency, the federal government should be in a position to prevent the development or continuation of explicit barriers to interprovincial mobility. If this prevention is to be effective, it should encompass job discrimination against out-of-province persons which exists simply because they are from out of the province.

How this is to be done is another issue. The problem may sometimes be perceived as certain sub-sectors of the labour market engaging in anti-competitive practices which restrict entry into the field, often interprovincially, and raise the return to that activity. One traditional solution here is to organize, through collective bargaining, a check on the part of those dealing with that group of producers. Effective checks to the power of many of the professions, other than by public authority, are not always easy to formulate. This can and is being done through the introduction of lay members to the governing councils of such groups. Because the professional bodies are subject to provincial statutes, this does not ensure a federal power to harmonize the regulations in order to guarantee the absence of explicit barriers to mobility.

One approach to this is through the more active use of federal competition policy in the service industries with greater scope for civil procedures. This has already been discussed at some length earlier. As noted then, one provision in the proposed competition bill (Bill C-256) was that a service industry could be exempted if a province assumed the responsibility to regulate it in the public interest. Such exemptions, if widely adopted, could effectively destroy the competition policy approach to removing barriers to interprovincial mobility of labour. There is no reason why a province should regard interprovincial mobility of skilled labour as uniquely synonymous with the public interest.

A second option, which flows logically from the nature of the common market aspects of the federation as discussed earlier, is to introduce explicitly the concept of labour mobility into the relevant parts of the present constitutional text. This would involve revising section 121 to add the concept of labour services to that of "articles", thus removing the possibility of special taxes on extraprovincial labour services of the kind now common in a number of professions. This would probably also mean that quotas on extraprovincial labour would also be struck down. This is too narrow a device because other restrictive devices, aimed solely at interprovincial mobility, are available. In some respects, it is also too broad a term to use. It could infringe on the provincial powers to regulate most trades and professions,

when what is desired is some control on the restrictions imposed on interprovincial mobility (and, in competition policy, on restriction of entry) rather than on educational qualifications and other matters. Conceivably, it might also inhibit federal, or federal-provincial, regulations of a nation-wide type which it might be desirable for the provinces to implement, whether for administrative or other reasons. All of this points, as a preferred alternative, to some restatement of the trade and commerce power in section 91 [2] in order to make its application to services of persons explicit, and also the possible inclusion of this concept in any new section on competition policy. An even more powerful statement would be to recognize explicitly the right to practice one's occupation, either under the trade and commerce clause of the *B.N.A. Act* or in some general statement of basic rights.

It may be argued that court tests of the trade and commerce power or other existing constitutional provisions might clarify this matter now. If this were so, one must then explain the remarkable continuity of highly restrictive provisions of the kind outlined despite their great harm to present and potential Canadians. But, before concluding this exploratory statement, another aspect, the access to public services, should also be considered.

5. *Access to Public Services*

Many things influence the movement of individuals and families between provinces. The availability of work, the quality of information on working conditions, housing, environmental questions, recreational facilities, educational facilities — the list is endless. Much government activity in some of these areas is directed primarily towards such objectives as improving consumer welfare, greater equality of opportunity, or cultural development. Questions of economic efficiency and labour mobility often play a secondary role in these matters, or are left to appropriate co-operation by various levels of government within their present constitutional jurisdictions. At least two issues require consideration at the constitutional level.

(*a*) The first is the area of education and the related issue of training or retraining for specific jobs. Closely related to this is the issue of information on job availability, on wage rates, and on working conditions generally. Inadequate training and inadequate information are recognized as major impediments to labour mobility, geographically as well as occupationally, both within and between provinces. The provinces have important constitutional powers in these areas and have exercised them. The federal government cannot help but have an important responsibility with regard to labour mobility given its responsibility to mitigate unemployment and to stimulate national productivity. This is highly relevant to the common market in two ways. Both labour productivity and labour employment are affected if there are inadequate levels or inadequate co-ordination among the various educational and training programs, or if information of jobs is poor.

An example can be cited with respect to post-secondary education, an example which has implications both for labour mobility and for the right of individual Canadians to have access to public services. Provincial governments are increasingly concerned about efficient planning of their heavy investment in such education. One issue which arises in many ways is the access of non-residents of the province, or of recent immigrants to it, to such education. There are already differential fees for foreign students in at least one province. Consideration has been given to differential fees for out-of-province students on the model of the fee system of a number of state universities in the United States. Where differential fees are considered, quotas are often not far behind. Presently, non-residents of a province, or recent migrants to it, often do not have the same access to provincial fellowships as do residents. Where restrictions on enrolment are necessary in particular fields of study, it is not uncommon to have explicit quotas for applicants from outside the province as well as for applicants from outside the country. Given their primary desire to enhance provincial welfare and their regulatory and spending powers with regard to education, it would not be surprising if some provinces were to emphasize provincial residence even more, either before enrolment or after graduation, or both. Yet, as noted, there are important extra-provincial issues involved and the federal government is also heavily involved in the finance of education and research.

It is fully recognized that the productivity and employment of labour raise major constitutional issues in Canada when translated into education and training. The latter require consideration in their own right, and are mentioned here only because of their importance to the issue of labour mobility and access to public services.

(*b*) The other matters which deserve specific mention here are those of income security and social services. These can become a major impediment to labour mobility where there is inadequate portability of accumulated benefits, or where extensive waiting periods are required before access to benefits is permitted, or simply where important benefits are comparatively low or non-existent. To what extent should social policy in these areas be harmonized so as to avoid serious impediments to labour mobility, and also for what are often more important reasons such as income redistribution and the fostering of a sense of community?

The Government of Canada has already stated its position on these issues.[1] What follows is simply a comment on a few features which are of particular relevance to labour mobility. They follow on those sections of the earlier study which gave data on the high interprovincial mobility of the Canadian population, noted the importance of having income security benefits which were portable, and suggested that, whatever the variations

1 *Income Security and Social Services* (1969).

provincially, some basic measures designed to provide a minimum must be country-wide if interprovincial migration to jobs were to be facilitated. [1]

The nature of the problem can be put briefly. In a federal state any desired degree of uniformity of income security or social services can be achieved in two ways. It may be achieved by a uniform federal policy which applies to all citizens in the federation. Alternatively, national uniformity may occur because all provincial plans are comparable whether because of co-operation, conditional grants, imitation, or whatever. It is only in the first case that one can state unequivocally that no consequent impediment to labour mobility is involved. This is because national uniformity, in the sense of comparable provincial plans, is not equivalent to portability. Where provinces have comparable plans there is no distortion to labour mobility for that reason, but impediments to labour mobility may still occur as a result of both "lock" and "block" characteristics. Where pension rights, credit for paid-in premiums for public insurance and compensation schemes, and similar benefits are not easily portable or readily transferable, the net result is to reduce labour mobility by creating a "locked in" effect on the existing distribution of labour. This is because the individual is reluctant to seek or exploit employment opportunities elsewhere whenever such a move will excessively reduce his accumulated benefits. For example, a worker may not wish to move to another province if he will lose credit for pension contributions already accumulated. As the length of accumulation increases, the lack of portability is transformed into an increasingly restrictive "locked-in" impediment. Again, if there is a provincial residency requirement (another manifestation of lack of portability) for qualification for certain programs, such as health and hospital coverage, an individual may be reluctant to move unless the period involved is brief or his previous coverage takes care of it.

At the same time, provinces which are unwilling to accept responsibility for the labour moving from other provinces impose a "blocking effect". For example, an unemployed worker may wish to seek employment opportunities in another province. If the other province will not accept responsibility for his income support or welfare security then the province may effectively block his entrance.

The major impediment to mobility is the absence of any scheme at all, or a wholly inadequate one, in some important policy area in one or more provinces. The Government of Canada has now the means to encourage such provinces to implement any such scheme. This section will concentrate, therefore, on one of the most difficult areas raised by the issue of portability, that of pension rights and contributions. The reasons for these difficulties are obvious. First, pension rights are increasingly regarded as

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[1] *Ibid.*, pp. 70 - 73.

deferred earnings rather than a reward for long, loyal and continuous service. Accordingly, the individual has a clear right to them, particularly where he contributes earnings towards them. Secondly, because pension rights represent accumulated deferred earnings, any lack of portability becomes very important in creating a locked-in effect. Workers are understandably reluctant to exploit more favourable employment opportunities at the expense of already earned, but deferred, income. Finally, with some exceptions, portability is essentially the feature desired, and not withdrawal in a lump sum. What the individual generally desires is a guaranteed future real income stream rather than a lump sum which cannot be converted without cost into such an income stream.

The effect of any lack of portability is not incidental to labour mobility but central to it. Moreover, pension rights are something more than a fringe benefit to employment. They represent an entitlement to a future stream of deferred income arising from past contributed earnings. As such they are an issue relating to the protection of human rights; since such benefits were earned, the individual should not be deprived of them on the basis of a change in residence.

There is one provincial plan in existence now and the other provinces have the constitutional right to establish their own plans and any supplementary benefits. Portability already exists between the Quebec and Canada plans, but there is no guarantee this will prevail if government plans proliferate and become more extended. There is also the problem of ensuring portability to private plans as well.[1]

The issue of pension portability extends well into the area of protection of civil rights and of social justice. It has much more to commend it than its quite significant effects in terms of labour mobility. The need to maintain some degree of uniformity and equity in retirement plans across Canada should be looked at closely both with regard to constitutional questions and the closest co-operation of federal and provincial governments.

[1] For a thorough discussion of the present degree of regulation of private pension plans, including questions of portability and of interprovincial co-operation, see F.M. Kleiler, *Canadian Regulation of Pension Plans* (Washington, U.S. Department of Labour, 1970).

Part V

Alternative Constitutional Changes

In this paper we have examined certain constitutional provisions which form the basis of the Canadian common market in goods, services, labour and capital, as well as a number of associated economic institutions. The object has been to suggest how the federal and provincial governments should share the constitutional powers involved in order to ensure the most productive and rewarding opportunities for our agents of production — labour, capital and owners of natural resources — and the most desirable mix of goods and services from the viewpoint of consumption. While the emphasis has been on goods and on labour, it should be noted that the principles are of wider interest.

In Part V the conclusions of this study are summarized, pointing to difficulties posed by the present division of powers. Alternative ways to resolve these difficulties through constitutional change are then suggested, along with some further observations on change through legislative and judicial activism and through co-operation between governments. The alternative constitutional changes discussed in Part V are listed below for ease of reference.

1. *List of Alternative Changes Proposed*

In section 3 below. Constitutional Guarantee of Internal Free Movement.

(a) and (b) Rewriting section 121 of the *B.N.A. Act* so that it explicitly covers services and persons, and goes beyond disallowing duties to cover other barriers to interprovincial trade.

(c) Further guarantees for labour mobility by adding a separate section, through competition policy, or by extending 91 [2] explicitly to services.

(d) Federal exemption from section 121.

In section 4 below. Strengthening the Common Market via the Regulatory Powers ((*a*) to (*d*) are alternatives to some extent).

(a) Further specifying jurisdiction by industry or by nature of activity.
(b) Delegation of authority.
(c) Conditional federal concurrency in intraprovincial trade and its instrumentalities where national uniformity requirements are involved.
(d) Adding an explicit general trade power to section 91 [2] or elsewhere; *or* fully rewriting section 91 [2] and relevant parts of sections 91 and 92; *or* revising the introductory clause of section 91 to cover general trade explicitly.
(e) Continuation of exclusive federal power in external commercial policy, both export and import.
(f) Specific and exclusive federal power in competition policy (mergers, combines, monopolies, restrictive trade practices) and with respect to patents, copyrights, and trademarks.

2. *Summary of Findings and Qualifications*

Before setting out the conclusions of this paper, three important qualifications are necessary.

First, only certain aspects of the common market and economic union have been considered in any detail here. For example, it was considered *logically necessary* to maintain internal mobility of goods and of labour and a common external policy for them. No consideration has been given in this paper to the extent to which capital flows, both internal and external, and the associated monetary institutions might be contained within the same criterion. Similarly, it was suggested that co-ordination of some areas of policy was so critical to achieving the gains from the economic union that uniform policy was *economically necessary*. Again, only certain topics were considered such as competition policy, patents and copyright. The specific topics covered in detail necessarily had to be restricted in this paper, given the need to develop some overall frame of reference for the common market and economic union. It is appropriate to emphasize that the concept of federal economic union encompasses, in varying degrees, a range of specific powers broader than those covered in detail here.[1] In addition, as will be noted further below, the way in which other important powers are exercised can critically affect the efficiency and viability of the economic union. Finally, taxation powers are generally neglected here since they were covered in other papers.

Second, the focus of this paper is the gains which arise from economic

[1] See section 3, Part I and section 2, Part II for brief comments on these powers.

integration through efficient growth in the Canadian market and abroad. It is fully realized that there are other critical objectives to policy, some of which are consistent with efficient growth and some of which are not. Increased national wealth through common market policies, for example, provides the transfers necessary to help correct regional disparities in public services and personal income. But, such common market policies do not benefit all regions equally and may harm some in specific instances. Hence, regional development policy is recognized in certain aspects as an agreed exception to the uniform treatment which the federal economic union often requires.

Third, while the analysis of this paper points to certain conclusions as outlined below, the preferred method for implementation of any of these conclusions cannot be set out dogmatically. Where constitutional change itself seems necessary, there are various options available, each with varying effects. It is difficult to be precise with regard to these options when changes to other related parts of the *B.N.A. Act* are also possible. In any case, the desirability of constitutional change, itself, will depend on one's perception of what may be possible through judicial or legislative activism, or of the role of political decisions from federal-provincial arrangements. Accordingly, in sections 3 and 4 of this chapter some alternative constitutional reforms which the analysis in this paper suggests will be set out and briefly considered.

The main conclusions of this paper to this point can be summarized as follows:

(1) The common market-economic union base of the federation logically requires that commodities and labour be permitted to move freely within Canada and that common external policies be applied to them.

(2) In order to realize the gains from economic integration, it is economically necessary to unify certain types of policies. In other cases, a high degree of co-operation between governments to achieve uniformity of policies, while not necessary, is desirable.

(3) The terms of the *British North America Acts* reflect a clear intention to create a high degree of economic integration in order to support the political union with a strong national economy. The constitutional guarantees in this regard were incomplete. The preoccupation was with commodities, as the wording of section 121 indicates. There was no corresponding guarantee of labour mobility. It can be noted, parenthetically, that the guarantee of integration of capital markets was stronger than for labour, as the references to several monetary institutions indicate, but still incomplete. Some major service industries such as banking and transportation, which are important to the common market, are referred to under various heads or sub-heads, but services, as such, are not explicitly dealt with in either section 121 or 91 [2].

(4) Federalism by its nature implies some division, or sharing, of legislative powers and a balance between federal and regional governments. The principle of the common market and economic union seeks to remove certain barriers and minimize others with regard to the movement of goods, services, labour and capital. In particular, the regulatory enactments of the governments involved should not distort this principle or should do so only for nationally agreed purposes.

(5) Since legislative authority is shared, the courts must decide the constitutional propriety of legislation so as to minimize conflict and also to spell out the meaning of powers. Court interpretation of the *British North America Acts* has, at best, only partly completed the process of defining the common market and has in some respects limited its realization. For example, it is still not clear whether and how far services are covered in either section 91 [2] or section 121. The critical limitation has been with respect to the scope of the trade and commerce power, section 91 [2], which in other federations has been used more extensively to promote a strong national economy. In Canada, for much of the period since Confederation, the attempts to distinguish separate networks of trade were made increasingly artificial by the growing interdependence created by technical and marketing change, and repeatedly served to prevent efficient regulation of matters of national interest by means of the trade power.

(6) It is true, nevertheless, that a considerable degree of economic integration has been realized in practice and that, as a consequence, considerable wealth has been available for both national and regional purposes. It is also true that serious gaps remain to be filled if major problems are to be avoided, as with labour mobility and upgrading of natural resources, or if further gains are to be realized. The geographic spread of large corporations, the mobility of skilled labour, increasing national and international interdependence, on the one hand, and the growing activism of the state, on the other, suggest that such problems will grow and will cause serious damage to the common market principle and to inter-governmental relations unless mechanisms are considered for their continuing resolution.

The main conclusion in this paper is that constitutional revision is necessary to guarantee more fully the common market and economic union basis of the federal state. This basis is susceptible to considerable erosion and is incapable of adequate realization in the absence of a strengthened guarantee. The ultimate result is a loss to all Canadians.

At the same time, other techniques can and should be used to further

the attainment of the aims of the economic union. A strong case can be made that more tests, and more effective tests, might be made to clarify, by court interpretation, the scope of the powers which underpin the federal economic union. [1] There are advantages to this method in terms of convenience and flexibility when compared with the probable speed and ease of a constitutional amendment process. In recent decades, there has also been a tendency on the part of the courts to interpret more broadly the constitutional bases of a number of national policies. However, in the past there have been limits to this process in practice, at least from the viewpoint of efficient economic regulation consistent with the principles of the common market. One limit has been the application of criteria by the courts which, given the particular viewpoint noted, appear inappropriate or incomplete. An example of this is the construction that intraprovincial trade involves those "transactions which take place wholly within a province" or that interprovincial and intraprovincial trade are to be interpreted as mutually exclusive networks. Even if factual evidence was used to esablish that one or other of these was *substantially* the case at a point of time, and neglecting the considerable interdependence which is typical of most economic transactions in a specialized monetary economy, there is very little prospect that the situation would not change significantly over time. Yet it is fair to note that the very purpose of factual evidence in such cases is not yet agreed, and there is also a considerable view that the role of the judiciary should be strictly constructionist in constitutional interpretation.

A great deal might be done, nevertheless, by appropriate tests and otherwise to encourage the use of more complete criteria which would define more fully the limits of various powers and perhaps even in some cases to lead to a reassessment of earlier decisions as circumstances change. Even then,the limits to this process should be clear. One is where the very definition of powers in the constitutional document is particularly unclear, incomplete, or inappropriate. Another is the strain which repeated testing might well place on the continuing processes of political accommodation between governments.

There are still other approaches which are clearly desirable in some contexts and which have been underexploited. There is no general legislation regulating trade in areas of federal jurisdiction, for example. As a consequence, neither provinces nor individuals are clear about the possible scope of federal law in this regard. Again, governments can and have used the technique of mutual delegation of administrative authority where a particular topic is not capable of adequate legislative coverage by either level of government.

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[1] The scope for this approach is examined in, among others, B.L. Strayer, *Judicial Review of Legislation in Canada* (Toronto, University of Toronto Press, 1968), and W.R. Lederman (ed.), *The Courts and the Canadian Constitution* (Toronto, McClelland and Stewart, 1964).

Whatever the possibilities for these and other approaches, they begin essentially from the base of a written constitutional document. The possible revisions to this as suggested by this paper will be presented in two sections, one of which will consider a stronger guarantee of the internal common market by an extension of section 121, and the other will consider a revised statement of certain regulatory powers designed to strengthen the economic union.

3. *Constitutional Guarantee of Internal Free Movement*

Section 121 is the primary constitutional expression of the internal common market when considered from the essentially passive stance of prohibiting of barriers to trade. It was noted earlier that section 121 has been interpreted as imposing restrictions on the fiscal but not on the regulatory powers of governments, and probably as applying equally to Parliament and the provincial legislatures.

At least four issues arise here.

(a) The present wording may not fully preclude taxes at provincial borders, by either level of government, levied on imports from outside Canada rather than "Articles of the Growth, Produce, or Manufacture of any one of the Provinces". Either a provincial tax based on 92 [2] and [9] or a federal duty is conceivable. This should be precluded in any rewording.

(b) While a tax or duty may be precluded, discrimination at the provincial borders by other regulatory devices is not explicitly precluded. A host of non-tariff barriers are possible, the effects of which are equivalent to those of taxes or duties. It would be logically consistent with the principle implicit in section 121 that these quantitative restrictions and other devices directed against out-of-province products or persons be prohibited. Some of them are extremely difficult to define without reference to particular situations. Others have an indirect effect on trade, and are focused essentially on other objectives being realized by the regulatory or spending powers of governments.

It was suggested earlier that many of these barriers involved aspects of policy where a degree of harmonization was economically desirable but not strictly necessary. It was suggested also that this conclusion would be more tenable if section 121 and/or 91 [2] were strengthened in order to increase the likelihood that they would prevent these non-tariff barriers when they are substantially discriminatory on an extraprovincial basis. The question is whether these are best reached by extending 121 or by the exercise of the federal power over interprovincial trade, as evident from court interpretations of 91 [2] in particular. It may be recalled that the federal trade power, and some related powers, have been restricted by court interpretation, and

that the constitutions of several other federal countries have gone much further than has that of Canada in assuring uniformity of economic legislation and non-discriminatory treatment of economic persons. United States jurisprudence, for example, has decided that federal competence is exclusive in trade and commerce activities requiring a certain national uniformity but that there are concurrent powers, with federal paramountcy, in areas where local interests and diversity are important. The test in that country is whether the state interest is outweighed by a national interest in the unhampered operation of inter-state commerce, and the economic significance is that Congress can assure harmonization of policy where the common market requirement is important. While that example may involve more uniformity than is appropriate for the Canadian situation, the analysis above did suggest certain gaps in the trade power in Canada which will be considered below.

The conclusion on this point will depend in part on the conclusion reached on the trade and commerce power. If the latter is not strengthened, there is a stronger case for a more complete guarantee with respect to prohibition of discrimination based on province of origin of goods or of persons. A possible rewording is given in the next section.

(c) It was noted earlier that the constitutional guarantee in section 121 extends only to a customs union in good . There is no mention in this section of the other central principles of the common market, which involve a removal of restrictions on the movement of labour and capital. Nor is it clear whether the term "articles" embraces services which are sold across provincial borders.

It is suggested that section 121 be reworded to remove this anomaly and to approach what is, to a considerable extent, already the practice in Canada. More and more services reflect the characteristics which have made many commodities so mobile, even when (as with commodities) the service provider himself is stationary. There is no logic in saying that the rewards to individuals and to the nation are higher if the market for goods is expanded but that, where this is feasible, the same is not the case for services. Architects and accountants, for example, supply services nationally and, to extends only to a customs union in goods. There is no mention in this section of the other central principles of the common market, which involve à removal of restrictions on the movement of labour and capital. Nor is it clear whether the term "articles" embraces services which are sold across provincial borders.

It is suggested that section 121 could be reworded as follows to prohibit discrimination based on province:

> All articles, services and persons in any one of the provinces shall be admitted to each of the other provinces free of duties, quantitative restrictions or charges or measures with equivalent effect.

This statement does not include a reference to capital because of the terms of reference of this paper, but it could easily be included if desired. Nor does it include a reference to "labour", both because an effective common market guarantee is not possible for labour services by this means given the orientation of section 121 and because important provincial regulatory powers might be compromised by their inclusion in such a section. The common market aims, as they pertain to the degree of access to jobs and public services, deserve separate consideration. It bears repeating that it is geographical mobility which is the present concern, rather than other aspects of the mobility of labour, and that some of the analysis on this topic was exploratory.

The first point to note is that guaranteeing the unrestricted mobility of *persons* in the sense proposed above, important as it is, is not the same thing as achieving the aim of a federal economic union to remove barriers to the geographic mobility of labour within Canada. The latter revolves fundamentally around effective access to jobs and to public services for legal residents of Canada, without discrimination by province or country of origin.

It was noted that the constitutions of several other federal countries go farther than that of Canada in this respect. In the United States, for example, the term "commerce" has been interpreted to include the transportation of persons, while the Indian Constitution goes so far as to mention the right to exercise an occupation, trade or business "at rest". It does not appear that these federations have fully solved the problem of guaranteeing constitutionally the freedom to exercise one's occupation "in motion", however, which is the essence of the objective of a federal economic union. Free movement of persons and a guaranteed right to work "at rest", for example, are easily offset by a waiting period before a person can take a local job. The Treaty of Rome, on the other hand, while envisaging less integration and less co-ordination than a federal state, but beginning with an explicitly common market-economic union orientation, has come much closer in principle. Chapter one of that treaty is entitled "Workers", and Articles 48 (1) (2) (3), 49 (a) and 51 ensure the free movement of workers; abolish discrimination with regard to employment, remuneration and working conditions which is based on nationality; and provide for harmonizing social security measures specifically in order to foster labour mobility. Chapter 3, entitled "Services", abolishes restrictions on the free supply of services within the community and defines this to include mobility of suppliers of services. It should be noted that actual practice in the group of countries involved falls well short of the principles noted here.

A great deal is being done and more can be done by way of federal-provincial and interprovincial cooperation to ensure the effective freedom of labour to move without being denied access to jobs and social services

because of the move. It should be noted that this approach would not guarantee the economic union structure with regard to labour mobility. Since some provinces may not participate in any particular agreement, significant obstacles to labour mobility might remain even with agreement, and any province could withdraw subsequently.

The constitutional guarantees might be worded in one or more of several ways. It has already been suggested that some rewording of section 121 is inappropriate for this purpose, given its orientation. Restrictions which could be contemplated with regard to the mobility of goods or persons, for example, might have little relevance to those necessary to ensure access to jobs and social services. A separate section might be envisaged to guarantee that there not be discrimination against workers on the basis of province of origin, in terms of access to jobs or to agreed services supplied by or underwritten by the state. The references to title 3 of the Treaty of Rome at the end of this paper indicate one type of effort in this direction. Alternatively, a revised approach to competition policy might supply a sufficient guarantee against job discrimination based strictly on province of origin, particularly if the scope of such policy with regard to services and with regard to a civil law approach is generally recognized. A third possibility is to recognize explicitly that section 91 [2] extends to services and thus to let the interpretations applied to it, or to any revision of it, become applicable to services. Whatever the approach adopted on these matters, constitutional guarantee offers the prospect of major gains for Canadians in terms both of human rights and economic opportunity.

(d) There is a serious problem which could arise if section 121 and any similar section on labour mobility were strengthened without qualification. While such sections are passive in the sense that they prohibit barriers to exchange or mobility, they can be extended to limit the exercise of the regulatory powers of the state in ways which are not critical to the common market. They might also make it more difficult, or even impossible, to attain other national objectives except by free enterprise or non-regulatory solutions, as has happened to some extent in Australia. Thus in Canada, they could be interpreted to limit the powers of the federal government to regulate interprovincial trade.

Most federal constitutions involve some explicit federal power to regulate at the state or provincial border for reasons of health or safety. More important, the view of the federal economic union advanced in this paper rests as much on the potential for efficient regulation to ensure the objectives of that union as on the mere absence of barriers to exchange and movement. The difference between the absence of a barrier to the movement of a person and the effective mobility of labour is a case in point.

It is suggested, therefore, that in areas of national interest the national government must continue to be able to regulate, if necessary, without this constraint. This could be to ensure the efficient working of the common market (as with competition policy), to achieve other national objectives, or in recognition of differing regional needs which cannot be met by regional approaches alone.

In other words, it does not seem necessary and it could be incapacitating to restrict the national government from regulating at a provincial border for purposes of national policy if that should be administratively or economically the most effective site for regulation.

This principle exists already in the interpretations most commonly placed on the introductory clause of 91, and on sections 91 [2] and 92 [10] (*c*). In brief, section 121, or its successors, should not take priority over these powers. This can be more fully assured in one of two ways. First, section 121 could be qualified to indicate that one or more of the sections just noted above with regard to federal powers, or any rewording of them, takes precedence over 121, or some parts of it. A second way to achieve the same effect is to state explicitly in any rewording of the federal regulatory powers discussed below that the power involved overrules section 121 or some parts of it. It should be emphasized that the exemption would apply only to the federal government, and only when acting on matters which transcend the interests of a single province. The federal government probably should not be exempted from the prohibition against duties at provincial borders and, possibly, quotas applied directly to interprovincial trade. A total and unconditional exemption would be inconsistent with a central characteristic of the federal economic union as it has long prevailed in Canada. It should be clear also that the exemption should not be extended to the provinces, since the purpose is to permit regulation at a provincial border for purposes of national policy.

4. *Strengthening the Common Market via the Regulatory Powers*

There are several possible approaches to strengthening the common market through the relevant regulatory powers, with somewhat differing consequences in terms of effectiveness of policies in this area and the effects on other objectives or powers. Before considering these approaches, some further comments are in order on the problem of specifying areas of jurisdiction with regard to industry or type of activity.

(a) One alternative would be to assign to the federal sphere of regulation certain activities, industries or even commodities which are essential to the efficient operation of the common market. This is done now, in effect, with regard to certain aspects of transportation and finance. With the exception of some clear cases, this approach quickly runs into problems of specifying which industries are national, as well as the awkward fact that the market

orientation of industries changes over time as population moves, preferences adjust, and production and marketing technology change. For example, it might be thought that most commodities, since they are transportable, could be assigned generally to a federal jurisdiction, while most services, which are not transportable unless the person providing them moves, might be assigned generally to provincial jurisdiction. This idea breaks down under even cursory examination. Many commodities are bound to local markets in any given period of time because of difficulties in transportation and other "natural" barriers to mobility. Many services are supplied on a national and international market.

One way to handle this problem is to have fairly general provisions which would have some changing applications from time to time vis-a-vis specific industries. The question, of course, is the basis on which these general provisions would be distinguished as between federal and provincial jurisdictions. A strong tendency to a geographic basis for these distinctions is inevitable in a federal state. If this is related in turn to a tendency to judicial interpretations at a point of time which are difficult to reverse later, considerable problems arise in applying effective policy to the existing economic realities. These points deserve repetition here, since one's view of their importance and intractability will affect the choice between the alternatives available to strengthen the management of the economic union encompassed in the federal state.

Faced with general (as well as some specific) grants of powers which overlap to each level of government, the courts have attempted to mitigate this by a process of mutual modification of the enumerated categories. While this does lessen overlapping, it also tends to preserve and even increase the exclusivity of the enumerated powers. At the same time it reduces the generality of the headings in both sections 91 and 92. Trade and commerce, for example, are carried on in articles in which persons have property and in respect of which they have civil rights. The courts have determined, in effect, that the term "the regulation of trade and commerce" is to be reduced in generality so that it refers to interprovincial, international and perhaps general trade and commerce, but not to intraprovincial trade. Similarly, property and civil rights are defined to exclude interprovincial and international trade and commerce. Further refinements were developed to indicate that incidental overlapping was acceptable in either direction and that, where federal and provincial features were roughly equivalent, both could legislate. The federal legislation would be paramount in the case of conflict.

This approach, however much it may have helped to classify legislation by its legal substance, has for long periods clashed with economic realities and limited the scope for effective regulation by either federal or provincial governments. The weaknesses of the attempt to define two networks of

trade were noted earlier, in particular the assumption that the significant effects of a transaction completed within a province are intraprovincial. Given the interdependence of economic transactions, an activity which is performed wholly within a province is not necessarily local for that reason. The activity may, in fact, be partly or even wholly one of export at some further stage, though that may not be evident at any given point of its production or sale, or at any given time. As noted earlier, in a 1957 judgment, four justices of the Supreme Court gave an explicit statement of this in terms reminiscent of the flow, current or stream concept of commerce found in United States jurisprudence. In this concept, elements which are local in themselves are also integrated into a sequence to form a current of trade across provincial or international lines. [1] Even the justices referred to above were careful to point out that the producer might not know the ultimate destination of his product. If this is difficult for natural products, it is almost impossible for many of the more complicated industrial products, and the more so as techniques of production, sources of supply, and markets all change with time. Neither that case nor some later ones have solved the problem of regulation where intraprovincial and extraprovincial aspects are substantially intermixed. Also, it will be recalled that, even in the 1957 case, some justices took a much more traditional view of the trade power. [2]

If they wish it, the courts in such cases can certainly seek more help from quantitative studies of the structure of the industry — including market orientation, source of supplies, and so on — with emphasis on intra-provincial and extra-provincial linkages. Over time, this might suggest further rules for determining when an activity should be subject to one or the other level of government. The question is how far can this be made consistent with a judicial process which places emphasis on important precedents? Once an activity has been classified under certain heads as provincial or federal, it has tended to be authoritatively settled for some time. Yet, ultimately, this type of economic study becomes obsolete, especially for those aspects of the economy which become increasingly interdependent. The history of Canada is replete with examples of goods or industries which are locally oriented in one phase and nationally and internationally oriented in the next, a few decades later. This is brought about by changes in marketing, transportation, communications, resource discoveries, and in legal barriers. The tempo of some of these changes is increasing. What is an incidental overlap of trading regions or effects in one decade can easily be a torrent of trade in the next. Legal processes, moreover, might have considerable difficulty, even with more factual analysis, in coping with the intricate degree of interrelation of the stages of production and marketing, and with the substitution which occurs in many economic processes. For example, the mobility of goods and of capital are substitutes to some extent. If the

1 See comments in Part II, section 3 above concerning *Reference re Ontario Farm Products Marketing Act.*

2 *Ibid.*, opinion quoted by Abbott, J.

mobility of goods into a province or country is impeded, it will help attract capital to produce the goods locally, as Canada has found with both multi-provincial and multi-national firms. The commodity may then move in the reverse direction, i.e. be exported from the province or country, if its production becomes efficient with time, if it receives sufficient subsidy or if it develops sufficient excess in supply. Similarly, capital and labour are to some extent substitutes.

The existing enumeration of powers and the tenor of court interpretation have often made it unnecessarily difficult and sometimes impossible for the state to legislate in the interests of common market objectives. There are significant gaps in regulatory powers resulting from the attempts to distinguish broadly between marketing and transport on the one hand and production on the other, or between intraprovincial and extraprovincial trade and similar distinctions. The effect is that the national government has too often been unable to regulate for national purposes the relevant aspects of specific industries, or even industry in general, except by devices which may be neither effective nor expedient. The reliance of the federal government on the criminal law powers in matters of trade is a case in point. There is no gain to provincial power when the federal government is barred from acting, or resorts to less effective devices, since the national objectives involved cannot be implemented by the provinces. It is difficult to see how the provinces gained, for example, by the weakening of the anti-combines and anti-profiteering legislation of the 'twenties, or by the attempts to deal with the depression of the 'thirties, or by the inability of the federal government to regulate many aspects of an industry such as insurance which generates and allocates a large part of national investment. The major outcome is that, unlike the central governments of most other federations, the Canadian national government is unable to serve national economic needs effectively.

(b) Where neither level of government is able to regulate effectively, it is possible under the present constitution to delegate executive authority in each case so as to permit joint regulation. This has been used, for example, with respect to agricultural marketing. There is scope for such a provision in any federal constitution which assigns some powers exclusively to each level of government, thereby creating overlapping and/or gaps in power in practice. Whatever its relevance to solving the stabilization problems in some industries, it suffers certain defects as a general approach to the problem of efficient national regulation. Frequent resort to delegation could bring about disparity in supposedly national programs with common market objectives in the event that one or more provinces declined to delegate. In the face of changing economic conditions and changing federal and provincial perceptions of their interests, it places a heavy load on negotiation between governments to achieve consistency on a continuing basis. Where a clearly national need has been identified and a case for a uniform or consistent policy across Canada has been made, moreover, the more appropriate locus of power

generally is the national government. This and similar considerations suggest that mutual delegation may well resemble, in some respects, the situation which would prevail with more concurrency of powers. This is considered next.

(c) At the root of the difficulties outlined in section 3(a) above is the attempt to preserve the distinction between regional and national trade. The courts have attempted this partly in order to preserve a balance between the needs of a national market, on the one hand, and a degree of provincial economic autonomy, on the other. They have done so at the cost of constructions which have limited effective regulation of trade and of economic activity more generally. Cannot these two clear imperatives of a federal state be better reconciled by placing less emphasis on exclusivity of the relevant powers and more emphasis on concurrency of powers?

Such an approach has many attractions. In particular, it would diminish, though not eliminate, the significance of the distinction between national and regional industries; hence it would avoid the rigidities and artificialities which have resulted from that construction. It would more certainly assure that gaps did not exist where legislation was desired, and would permit one level of government to legislate where the other was unwilling, or unable to do so.

What this would mean in the area of trade and commerce is that each level of government could legislate with respect to the jurisdiction now reserved for the other. Regulations from independent sources will conflict at times for the interests and constituencies of the two levels of government are different. The regulations of some provinces will also conflict with those of others, sometimes resulting in significant harm to the federal economic union. There is no need to labour the point since it was made in the discussion of the poultry and egg industries and elsewhere above. Some principle of resolution is necessary for such conflict. The overriding principle in the area of trade and commerce is to ensure that policies are harmonized so as to maintain the common market and economic union internally, and so as to have common external commercial policies consistent with this. What would be necessary is a recognition of the paramountcy of the national government on matters vital to preservation of the federal economic union, including its management by regulation. The provinces would be paramount in matters of local trade and commerce.

It is apparent that concurrency does not obviate the need for rather familiar concepts which are integral to a federal state. What it does is to permit each level of government to legislate across an entire area of activity so long as the vital interests of the other are protected. Allocating powers by this principle can raise serious problems where the power involved is fundamental to national unity or to local diversity. Both the federal and provincial governments might well consider guarantees for the common market and

economic union to be in the former category. Such guarantees would require much more than a strengthened section 121. They would necessitate methods to assure that the federal government could require that regulatory powers be used in ways consistent with this. In the absence of such a requirement, differing provincial regulations on trade (and not only "interprovincial" trade, as this paper has emphasized) would soon destroy the common market.

This paper's conclusions point to the need for constitutional revision to guarantee more fully the common market and economic union basis of the federal state. All governments have an interest in this strengthening of the economic basis of the country but the federal government has the major responsibility, given the nature of its constituency.

Conditional concurrent powers for the federal government offer one way in which provincial paramountcy would continue to prevail in property and civil rights, matters of local concern, or "intraprovincial" trade, while the federal government could legislate in these areas to the extent necessary to assure the preservation of the common market and economic union. The fact is that a great deal of *implicit* concurrency now exists in this area, specifically in the overlap of 91 [2] and 92 [13] as described in section 3 (a) above. An *explicit* extension of concurrency to such broad areas of power, without qualification, could create serious difficulties since vital provincial interests which should be preserved are also involved. Conditional concurrency with an appeal to the courts very largely preserves these interests while permitting a surer guarantee of the common market and economic union by the government most directly concerned. As noted, provincial paramountcy would remain except as modified below. The federal government would have the power, however, to legislate on intraprovincial trade and its instrumentalities in a manner consistent with provincial law, or in a manner not consistent with provincial law if necessary to sustain the uniformity requirements of the common market. The necessary conditions would have to be specified in the constitution in terms of the need for national uniformity. There are various models one might follow in deriving such uniformity requirements, including that of the United States or of the Federal Republic of Germany, or a set of requirements derived more directly from Canadian constitutional experience. [1]

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[1] The requirements in the United States were discussed in Part II, section 4. The Basic Law of the Federal Republic of Germany includes the following under Legislative Powers of the Federation (VII, article 72).

1) On matters within the *concurrent legislative powers* the Laender have authority to legislate as long as, and to the extent that, the Federation does not use its legislative power.
2) The Federation has the right to legislate on these matters to the extent that a need for a Federal rule exists because
   1. a matter cannot be effectively dealt with by the legislation of individual Laender, or
   2. dealing with a matter by Land law might prejudice the interests of other Laender or of the entire community, or
   3. the maintenance of legal or economic unity, especially the maintenance of uniformity of living conditions beyond the territory of a Land, necessitates it.

It may be added that "economic matters" and labour are among the concurrent powers.

Such an approach, while departing less than some others from the present division of responsibilities, is likely to place a heavy load on negotiation between governments to achieve consistency and, failing this, on the courts. Short of recourse to the courts, it may also increase the degree of uncertainty for the electorate as to which level of government is to be held responsible for the outcome of given situations. An alternative route is to attempt directly some clarification of the present distribution of powers.

(d)The clear need in the area of trade and commerce is to ensure that the national government has sufficient power to regulate where the national economic interest requires this. At the same time, local regulations should be broadly consistent with the maintenance of the unity of the common market and economic union.

The power to regulate can be considered with regard to a particular industry or all industries, and with regard to a range of activities from extraction of raw materials through processing, manufacture and distribution. Those industries which are critical to the operation of the federal economic union have been specifically designated to some extent in the constitution. The federal government has the power to designate others through the declaratory power of section 92 [10] *(c)*.

In effect, the option under consideration would simply continue the present distinctions insofar as regulation of industry is concerned. This includes a divided jurisdiction according to criteria of local and interprovincial industry which, admittedly, are not always clear. To attack this difficulty by suggesting integration of control over industrial regulation, or even concurrency with federal paramountcy in the event of conflict, would seriously limit provincial powers. Proposals, for example, which suggest that Parliament should be able to regulate a product where the principal market is outside of the province of production either underestimate the extent to which Parliament can regulate interprovincial and international trade or underestimate the extent to which unified regulation of all phases of a product would reduce provincial powers. [1]

A preferred approach from the viewpoint of the common market objectives would be to recognize more explicitly than may now be the case the authority of Parliament to legislate for all of Canada on matters of trade and commerce which, whatever their immediate market orientation, are deemed to be of national advantage. [1] What is suggested here is that the *general* trade and commerce power, as distinct from that over interprovincial and international trade, be given a clearer status than it has had. The national government could then legislate where the interests of the national economic unit required this, without resorting either to indirect and ineffective means or, as

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1 This appears to be the proposal of the Special Joint Committee of the Senate and the House of Commons on the *Constitution of Canada* in its Final Report (Ottawa, Information Canada, 1972), p. 84.

2 See the discussion on this in Part II, section 3, under The Distribution of Powers: Federal Powers.

might occur with the approach of section (c), to unnecessary incursion into local jurisdiction. This power to legislate uniformly across Canada on matters of trade and commerce would be used either where a matter was of national importance, regardless of trade orientation, or where provincial regulation of "local" trade has or would seriously jeopardize the union. These tests could be stated in the constitution and be applied judicially. For greater security of provincial interests it might be suggested that (a) this general trade power be exercised on a declaratory basis, as is the case with "local works and undertakings" in section 92 [10] (c), or/and (b) prior consultation be formally guaranteed in order to ensure that alternatives are fully considered by provincial and federal governments alike.

This proposal really amounts to a continuation of the present, implicit concurrency of federal and provincial powers in trade and commerce, and, where these overlap, with property and civil rights. It continues the judicial recognition of federal paramountcy in international and interprovincial trade, and of provincial primacy in local trade, admitting that the attendant overlap and blurring of powers either cannot be ended without severely diminishing the powers of one level of government, or ought not to be ended because of the interdependence of economic processes and the advantages of concurrency cited earlier. At the same time it provides a way to remedy a gap in national legislative powers with a minimum disturbance to present arrangements and powers, and with a focus on the efficient management of a large common market.

It is possible to achieve the objectives of the protection and efficient regulation of the common market more directly and immediately. It is possible, for example, to rewrite the phrase "The Regulation of Trade and Commerce" and related parts of sections 91 and 92 to ensure more precisely the realization of the specific objectives of this paper. Perhaps that will be considered necessary if a wholesale rewriting of the division of powers is undertaken. The cost of such an approach could be high, including years of uncertainty about the effects on the many activities included in such general phrases. More particularly, such a general restatement may be unnecessary to achieve the objectives envisaged in this paper. A reading of constitutional history, moreover, suggests that the results of more detailed enumeration or specification are not always predictable in terms of subsequent court interpretations.

The approach presented here would need to be supplemented by consideration of some other issues. Court interpretation in Canada has not clarified the extent to which 91 [2] applies to intangibles as well as goods, for example. This is in contrast to the situation in countries such as Australia, as noted earlier, where the courts have gone further in clarifying the scope of "trade, commerce, and intercourse". There is also the question of the power to prohibit trade by this section. These and other matters might be further

specified in a rewritten 91 [2], but with all the difficulties just noted. On the other hand, a general trade clause of the kind noted here, inserted separately into the *B.N.A. Act* or appended to 91 [2], might not raise these difficulties. To the contrary, court interpretations of the clause might then be feasible which might clarify the role of intangibles, as well as other matters.

Another alternative would be to consider some revision of the introductory clause of section 91, the power of Parliament to make laws for the peace, order and good government of Canada. This clause has received more generous interpretations recently which suggest that it might be used to support some of the legislation which might otherwise be covered by a general trade clause. If one considers the types of cases involved, it appears to date that something more than the important, but relatively mundane, issues of trade and commerce were at stake. If this view is not correct, then the ultimate limits of the introductory clause of section 91 could go far beyond anything envisaged in this section of the chapter.

It may be that federal jurisdiction in total is capable of extension to cover this area by a series of court tests. The introductory clause of section 91, the sole power under 91 [2] to regulate interprovincial and international trade, the declaratory power of 92 [10] (c), the criminal law power, and a series of other more specific powers, form a formidable battery if consistently used together. This approach involves the definition of powers by more court cases and less recourse to consultation and co-ordination, with whatever consequences that may suggest. However, such an approach would leave uncertain for some considerable time the scope of a power which has already been left too long in that situation, at no small cost to government and people alike.

Accordingly, some consideration should be given to rewording section 91 [2] to read as follows:

> The Regulation of Trade and Commerce, including such trade, commerce, and ancillary activity as, although carried out wholly within the province, shall be declared by the Parliament of Canada to be to the general advantage of Canada.

or this phrasing in some separate section.

An explicit general trade power of this type, even on a declaratory basis and with consultation required, may be unacceptable to some provinces given the necessary overlap with local trade. If accepted, it may, nevertheless, become usable only in very grave situations which can be handled now in other and somewhat inflexible ways such as the criminal law power or the introductory clause to section 91. This is precisely the rigidity which this general trade power is intended to overcome. An approach which might be more acceptable and workable would be an explicit general trade power as noted. This would be accompanied by specific criteria as to when it could be

declared and would be subject to court interpretation. The criteria for other countries, as noted in the section preceding this one, are of interest here.

At the end of section 3 of Part V of this paper it was noted that section 121 of the *B.N.A. Act* should not take precedence over certain federal regulatory powers. If this is not clarified in a reworded section 121, it should be clarified in any rewording of the federal regulatory powers discussed above.

(e) The analysis in this paper points to a continued exclusive federal power in external commercial policy, both export and import. This is logically required by the nature of a common market-economic union, and it is economically necessary if the internal common market is to exist in practice and if the gains possible from external trade are to be realized.

(f) Regardless of whether any of the foregoing alternatives are adopted, it is recommended that there be a specific and exclusive federal power to deal with mergers, combines, monopolies and restrictive trade practices. This power should be capable of full exercise by both criminal and civil procedures. It should also apply to all forms and geographic divisions of production and distribution in principle, except perhaps for the type of agreed exception envisaged by the proposed Act on this subject.[1] The earlier discussion of this topic identified competition policy as integrally related to the effective management of the common market, hence properly within a federal power. A similar case was made for patents, copyrights and trademarks.

As emphasized earlier, a number of industries and other heads of power are either logically or economically necessary to the common market and economic union. While the framework provided in this paper may help resolve their allocation, they have not been specifically considered here.

[1] See comment on Bill C-256 in Part III, section 2.

Appendices

Excerpts from the Treaty Establishing the European Economic Community and Connected Documents

TITLE 3 *The Free Movement of Persons, Services and Capital*

Chapter 1 *Workers*

ARTICLE 48

(1) The free movement of workers shall be ensured....

(2) This shall involve the abolition of any discrimination based on nationality between members of the member states as regards employment, remuneration, and other working conditions.

(3) It shall include the right, subject to limitations justified by reasons of public order, public safety and public health:

- (*a*) to accept offers of employment actually made;
- (*b*) to move about freely for this purpose within the territory of member states;
- (*c*) to stay in any member state in order to carry on an employment;
- (*d*) to live....in the territory of a member state after having been employed there.

Chapter 3 *Services*

ARTICLE 49

(a) (aims at progressively abolishing).... any such administrative procedures and practices and also any such time-limit in respect of eligibility for available employment. ... which would be an obstacle to the freeing of the movement of workers;

ARTICLE 51

(The Council).... shall, in the field of social security, adopt the measures necessary to effect the free movement of workers....

ARTICLE 59

Within the framework of the provisions.... restrictions on the free supply of services within the community shall be.... abolished....

ARTICLE 60

Services.... shall be deemed to be services normally supplied for remuneration, to the extent that they are not governed by the provisions relating to the free movement of goods, capital and persons. Services shall include in particular:

- (*a*) activities of an industrial character;
- (*b*) activities of a commercial character;
- (*c*) artisan activities; and
- (*d*) activities of the liberal professions.

Appendix 2

Distribution of Economic Powers as Indicated in the British North America Acts[1]

Powers of the Parliament, section 91

It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

(1A) The Public Debt and Property.
(2) The Regulation of Trade and Commerce.
(2A) Unemployment Insurance.
(3) The raising of Money by any Mode or System of Taxation.
(4) The borrowing of Money on the Public Credit.
(5) Postal Service.
(6) The Census and Statistics.
(9) Beacons, Buoys, Lighthouses, and Sable Island.
(10) Navigation and Shipping.
(11) Quarantine and the Establishment and Maintenance of Marine Hospitals.
(12) Sea Coast and Inland Fisheries.
(13) Ferries between a Province and any British or Foreign Country or between Two Provinces.
(14) Currency and Coinage.
(15) Banking, Incorporation of Banks, and the Issue of Paper Money.
(16) Savings Banks.
(17) Weights and Measures
(18) Bills of Exchange and Promissory Notes.
(19) Interest.
(20) Legal Tender.
(21) Bankruptcy and Insolvency.

1. From *A Consolidation of the British North America Acts 1867 to 1965*, prepared by Elmer A. Driedger (Ottawa, Queen's Printer, 1967). Most of the items in Part VII, dealing largely with public debts and transitional devices, have been excluded from this list.

(22) Patents of Invention and Discovery.
(23) Copyrights.
(25) Naturalization and Aliens.
(27) The Criminal Law except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
(29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

Exclusive Powers of Provincial Legislatures, section 92.

In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say, —

(2) Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
(3) The borrowing of Money on the sole Credit of the Province.
(5) The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
(9) Shop, Saloon, Tavern, Auctioneer and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
(10) Local Works and Undertakings other than such as are of the following classes: —
(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings Connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
(b) Lines of Steam Ships between the Province and any British or Foreign Country;
(c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general

Advantage of Canada or for the Advantage of Two or more of the Provinces.

(11) The incorporation of Companies with Provincial Objects.

(13) Property and Civil Rights in the Province.

(14) The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.

(16) Generally all Matters of a merely local or private Nature in the Province.

Education, section 93.

In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:
(several sub-sections follow on religion and education).

Old Age Pensions, section 94A.

The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter.

Agriculture and Immigration, section 95.

In each Province the legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada

Section 102.

All Duties and Revenues over which the respective Legislatures of Canada, Nova Scotia, and New Brunswick before and at the Union had and have Power of Appropriation, except such Portions thereof as are by this Act reserved to the respective Legislatures of the Provinces, or are raised by them in accordance with the special Powers conferred on them by this Act, shall form One Consolidated Revenue Fund, to be appropriated for the Public Service of Canada in the Manner and subject to the Charges in this Act provided.

Section 109.

All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. (The four western provinces were placed in the same position by the B.N.A. Act, 1930).

Section 121.

All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces.

Section 132.

The Parliament and Government of Canada shall have all Powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards Foreign Countries, arising under Treaties between the Empire and such Foreign Countries.